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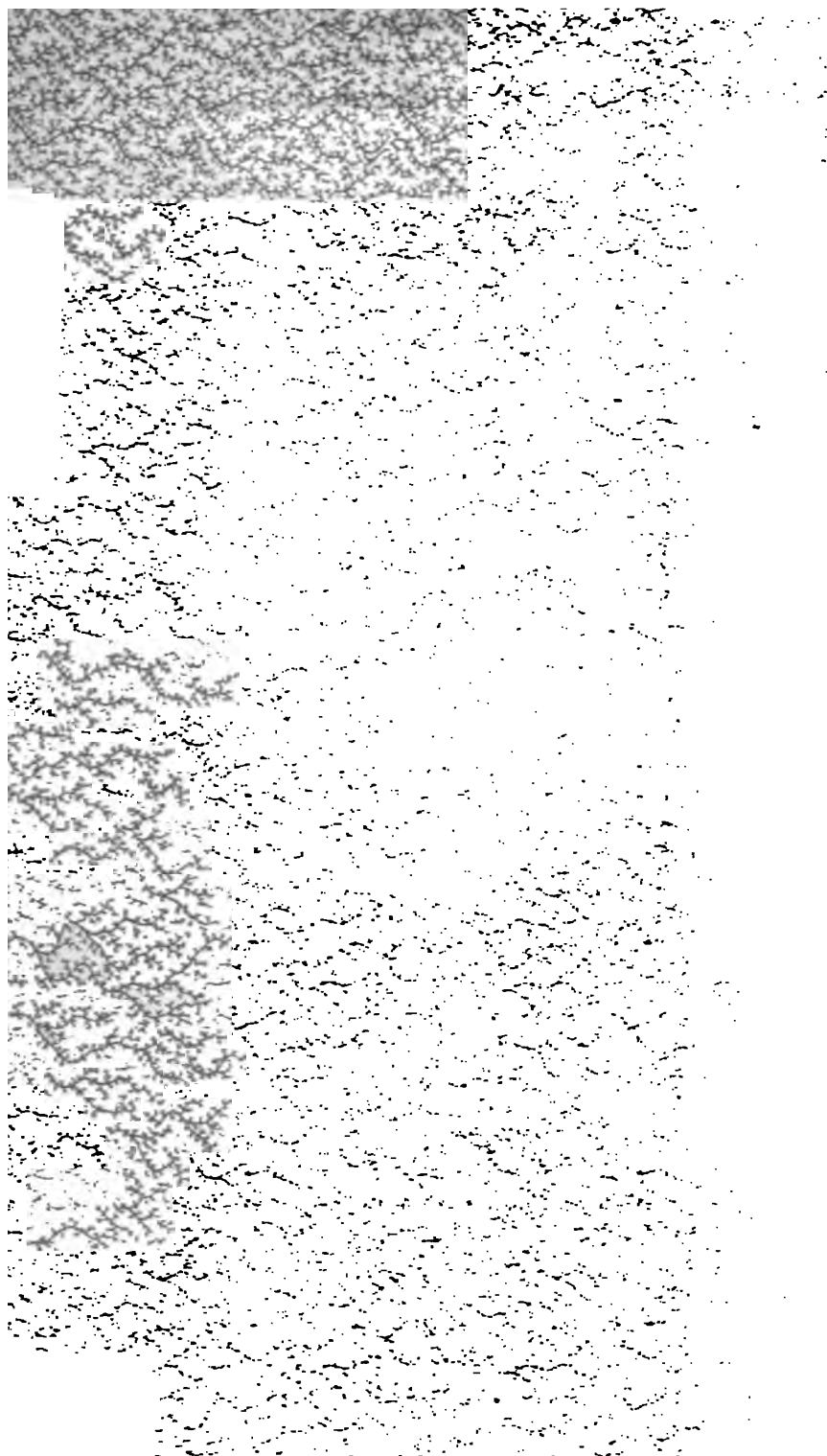
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ANNEX

ECCLESIASTICAL L A W.

BY

RICHARD BURN, LL.D.

CHANCELLOR OF THE DIOCESE OF CARLISLE,
AND VICAR OF ORTON IN THE COUNTY
OF WESTMORLAND.

“ The Temporal Law and the Ecclesiastical Law are so
“ coupled together, that the one cannot subsist without
“ the other.” *Lord Coke in Moore's Rep.*

THE SIXTH EDITION;

WITH NOTES AND REFERENCES

By SIMON FRASER, Esq.

BARRISTER AT LAW.

IN FOUR VOLUMES.

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Commemoration.

Commemorations in the ancient church were recitals of the names, and honourable mention made in the solemn offices of worship, of such persons as had been eminent for piety and sanctity, and who had departed this life in the fear of God, and in communion with the church of Christ. And this was done with a kind of prayer and thanksgiving; not from any supposed benefit that it would be to the dead, but for the example and encouragement of the living. And from hence may be deduced the observation of saints days in the church. *Ayl. Par. 190.*

But in process of time, as this was usually performed upon the day of the person's death, the same degenerated into annals, anniversaries, obits, and such like: wherein prayers were put up for the soul of the deceased, and masses celebrated for the redemption thereof out of purgatory. And upon this foundation the chauntries were established and endowed. *Ayl. Par. 190.*

Also, where the service of the lesser holiday falleth in with a greater, it is called a commemoration; in which the service of the greater holiday is performed, and commemoration only is made of the saint for whom the inferior service is appointed. *Gibf. 263.*

Commendam.

2. **C**ommendam is a benefice or ecclesiastical living, *Commendam,* which being void, to prevent its becoming void, *what.* *commendatur,* is committed, to the charge and care of some sufficient clerk, to be supplied until it may be conveniently provided of a pastor. Thus when a parson of a parish is made the bishop of a diocese, there is a cession of his benefice by the promotion; but if the king gives him power to retain his benefice, he shall continue par-

Commendam.

Restraints of
commendam.

son thereof, and shall be said to hold it in commendam. God. 230. (a)

2. By a constitution of Othobon: *Whereas divers persons, to avoid the laws against pluralities, do procure vacant benefices, to be commended to them, to the great decay of piety and hospitality, and to the sin of those who grant such commendams; we do decree that no church shall be granted in commendam, but for just and lawful cause: and in such case, that no church shall be commended to any person who hath more than one benefice with cure of souls; and that no person shall have more commendams than one; on pain that the same shall be void, and the bishop who shall grant such commendam shall be suspended from collating or presenting unto benefices until he shall recalc the same.* Athon. 120.

And by a constitution of archbishop Peccham: *We do decree, that if any person shall take or obtain more than one benefice with cure of souls, or otherwise incompatible, without dispensation of the apostolic see, either by way of institution or of custody or commendam, or one by institution and another by commendam, except they be held in that manner which Gregory's constitution made in the council of Lyons doth permit; he shall be deprived of all benefices so obtained, and be excommunicated ipso facto, and not absolved but by us or our successors or the see apostolic.* Lind. 136.

Gregory's constitution] Which was, that no commendam should be granted to any person, but who was of lawful age, and a priest, and but one commendam to one person, and that only when evident necessary or

(a) The words "to prevent its becoming void," are not in Godolphin, and seem to have been added to the definition to make it extend to commendams *retinere*, which Lord Hobart says are not properly commendams though usually called so, but merely faculties to retain, *infra* 4. for according to him there is no difference between a commendam and a presentment, but that the one presents the parson to the church, the other commits the church to the parson. Hob. 150. According to the same authority commendams are of three degrees; one *semestris*, that the church may not be without a parson during the patron's respice of six months; another *perpetua*, or for life; the third *limitata*, or temporary, which limitation however is not allowed in commendams *capere*. Hob. 144. 153. *Colt and Glover v. Bp. of Coventry and Litchfield*, where much learning on this subject is to be found. S. C. 1 Rel. Rep. 451. and Moore 898.

the

the advantage of the church required it, and the same to continue no longer than for six months *Gibf.* 913. (b)

3. The possession of a bishoprick doth of common right void all other promotions: this is the ancient law of the church as expressed in a canon of the council of Lateran under Alexander the third (c). And agreeable hereunto (and without doubt, derived from this) are the declarations that we meet with every where in the books of common law, that of common right all promotions are vacated by the taking of a bishoprick as such (d): but the law is otherwise, if one is a mere titular bishop, or a suffragan bishop upon the statute of the 21 H. 8. c. 14. *Gibf.* 913.

Benefice vacated by acceptance of a bishoprick.

4. But this voidance may be prevented by dispensation of retainer, granted before possession of the bishoprick: which is commonly called a *commendam retinere*. This the pope had power to do, as claiming a right to dispose of all promotions becoming void in that manner. And the same thing the king may do; either singly and by himself (as many of the law books hold), or at least by command to the archbishop to exert the right of dispensation vested in him by the statute of the 25 H. 8. c. 21. as the ordinary method is. Which sort of commendam is defined by Hobart to be, a faculty of retention and continuation of the benefice in the same person and state wherein it was, notwithstanding something intervening (as a bishoprick, or the like) that without such a faculty would have avoided it (e). By which means, the institution and induction, or other method whereby the person obtained such benefice, remain and are continued in their full force. And it being the doctrine both of canon and common law, that former promotions are not vacant, but by consecration in case of creation, and by confirmation in case of translation; if such dispensation comes before these, it comes in time enough to continue the possession; but otherwise it comes too late (f). Thus it is said in the books of common law, that cardinal Beaufort's dispensation to hold the bishoprick of Winchester, coming after

But the voidance may be prevented by a commendam.

(b) 6° 1. 6. 15.

(c) X. 1. 6. 7.

(d) 4 Mod. 210.

(e) Hob. 143.

(f) *Neg* 93, 94. *W. Jones* 158. *Vaugh.* 18. *Evans and Kiffin v. Ashworth.*

Commendam.

he was made cardinal, was void; but that cardinal Wolsey's for the archbishoprick of York, coming before, was good. *Gibf. 913. (g)*

And not only dignities and benefices have been granted in commendam, but also headships of colleges, and hospitals, and that by dispensation; as, for instance, of headships, St. John's in Oxford, to Dr. Mews bishop of Bath and Wells; of Magdalen college in Oxford, to Dr. Hough bishop of Oxford; of Pembroke college, to Dr. Hall bishop of Bristol; and of Hospitals, at St. Cross near Winchester, to Dr. Compton bishop of Oxford; and St. Oswald's near Worcester, to Dr. Fell bishop of Oxford. *Id.*

It hath been questioned, whether a lapse might be made a commendam: but that seems to be a groundless nicety; since it is certain, that whoever hath right to present by such lapse, hath by the same reason a right to consent that it be granted in commendam perpetual, which is equivalent to a presentation. *Id.*

Whether a bishop may have a commendam in his own diocese.

5. It hath been questioned heretofore, whether a bishop could take a commendam in his own diocese, because the same person cannot be visitor and visited: but it hath been answered, that the bishop is under the correction of the metropolitan: and accordingly, that he may have such commendam. *Gibf. 913. (h)*

Patron's consent necessary.

6. No commendam can be granted but with consent of the patron. This is the doctrine of the canon law (*i*). And therefore in granting a commendam *retinere*, the king (who is patron by the promotion) signifies his consent, by his mandate to the archbishop to grant dispensation: and if the commendam be by *recipere*, it is either to take a promotion in the bishop's own gift, and so his acceptance is a consent; or in the gift of some other patron, and then the consent of such patron must be given in an authentick manner, and mentioned in the dispensation. And Hobart said, that if the archbishop should commend to a certain church void, without the patron's consent; the instrument of commendam would be void, tho' the patron should consent afterwards. *Gibf. 913, 4. (k)*

How far a commendam continues the incumbency.

7. By a commendam *retinere* the incumbency is continued. This follows plainly from what hath been said; that the voidance is thereby prevented, which would other-

(g) *Dav. 80.* *(h)* *1 Rol. Rep. 463. Mon. 899.*
(i) *Atb. 131.* *(k)* *Hob. 152.*

wife have ensued ; in the same manner as it is prevented with regard to a first benefice incomparable, by dispensation to hold a second or a plurality of benefices. For this reason, it was said by Hobart, that a commendam *retinere* is improperly called a commendam ; for (saith he) my own benefice cannot be commended unto me. And it is clear from the foregoing constitutions, that what the canon law meant by this term, was only with regard to the second benefice taken *de novo*, by way of custody or commendam, and (to prevent the voidance of the first) not taken by way of institution ; and that it was no more than the committing to the incumbent of one church the cure and revenues of another, either for a time limited (as six months), which time the patron had to consider of a proper clerk that the church might be taken care of, or (with consent of the patron) for a longer term, to the end chiefly that such incumbent might be the better supported : the first of which (to wit, the care of the church during the vacancy) is now answered by sequestration of the benefice ; and the grant of the second (namely, the profits of the vacancy) is rendered impracticable by bishop or patron or both, by the statute of the 21 H. 8. c. 11. which gives the profits of the vacation to such person as shall be thereunto next presented promoted instituted or admitted. Which profits before this act belonged either to the church, and so were in the disposition of the patron and bishop ; or to the ordinary, or other person to whom by custom they appertained, and so by the previous consent of such person might be yielded to the commendatary : but the next incumbent being a person uncertain, cannot give such consent, and by consequence the revenues of vacancies, since the making of the said act, cannot be given ; which seems to be the true reason of the utter disuse of that sort of commendams, with regard to presbyters ; however it hath continued, by prerogative royal, in favour of bishops. *Gibf.* 914.

But a commendam *capere* (that is, a dignity or benefice taken by a bishop after consecration, and without institution) doth not create a proper incumbency. The canonists were not clear, whether during a commendam, the church commended was not really vacant ; and whether the commendatary was in law any more than a guardian, administrator, or procurator of the church, during such vacancy ; and they who hold that they were something more (because commendam is a title owned by the canon law) pretend not to say, that they were incumbents ; they hold

only by a corrupt and precarious title, invented on purpose to elude the laws against pluralities. In like manner, though the books of common law say, that a commendatary by *retinere* remains full incumbent, and may plead as such; yet of a commendatary by *capere* they say, that a dean by such commendam cannot confirm a lease made by the bishop, and that a commendatary parson in that way cannot have a *juris utrum*, nor take to him and his successors, nor can sue or be sued in a writ of annuity. *Gibf. 914.*

But on the other hand, there is one circumstance which makes much for the real title of such ancient commendataries as were such by *retinere*; namely, that we find these benefices declared vacant by the *resignation* of the commendataries, of which there are several instances to be met with in the archbishop's register. *Id.*

For what time
a commendam
may be.

8. Commendam may be temporary or perpetual at the pleasure of the king. When it is temporary, the precise time is expressed and limited in the dispensation; when perpetual, the style is, so long as he shall live, and continue bishop of that see. And in the case of a commendam *retinere*, whether it be temporary or perpetual, it is only a temporary or perpetual continuance of the original incumbency, or the preventing of an avoidance for such a term; of both which there have been frequent instances. And so anciently, in the case of a commendam *capere* granted to presbyters; the term, when it went beyond six months (which was little more than a sequestration), was sometimes for a year, in case a person who had entered into a religious state did not return after this year of probation; sometimes, till another person was in orders; sometimes, to continue at the pleasure of the ordinary; and sometimes for life. But at present in the case of bishops, the books of common law seem generally to fall into the opinion, that a commendam *capere* ought to be perpetual; because (there being no previous title by institution, as it is in the case of a commendam *retinere*) the law knows not what to make of any thing that shall be called a title, and not be equal to that, at least in point of perpetuity (*l*); and Dr. Gibson says, he believeth that in fact there is no instance of a commendam *capere* in the ecclesiastical records, but what hath been unlimited or perpetual: tho', whatever the right be that it conveys, it

(*l*) *Hob. 152.*

Commendam.

seemeth (in reason) to be capable of being as well temporary as perpetual. *Gibf.* 914.

9. According to the duration of a commendam and the commendatary, the right of the crown to present upon promotion is served or not served. If the commendam be limited to a certain term, the king shall present by prerogative at the expiration of such term, notwithstanding the previous grant of a commendam; unless it so fall out, that the commendatary bishop dies or resigns before the expiration of the term; for in such case, the church becoming void not by cession but by death or resignation, the turn of the crown is served, and the patron shall present (*m*). And so it is likewise served, if the commendam was originally unlimited, that is (according to the language of the faculties) during the life of the person and his possession of such see; because this amounts to a presentation, and therefore in this case also, the right of the crown is served, and the patron presents. *Gibf.* 915.

How far the king's right to present is served thereby.

But if a bishop who is possessed of a commendam, is translated to another see, and so a new title accrues to the crown by a new promotion; the same commendam may be continued, if the king pleaseth: but it must be by a new dispensation, granting it to be held with the new bishoprick. *Id.* (*n*)

10. Commendam temporary in *retinere* may be renewed and prolonged; that is to say, before the original incumbency ceaseth by the expiration of the first dispensation, a second dispensation may be granted, to prevent the avoidance, and continue the incumbency. 'Tis true commendams being designed to support the dignity of the episcopal character (which since the time of the reformation hath greatly needed support in many sees) they have usually been granted in perpetuity; in which case, there was no occasion to renew them. But that such renewals were understood to be legal and regular, appears by the applications that have been made for them, without any marks of doubt, as to their legality: in one instance, by the bishop of Carlisle in the year 1567, and in another instance the very next year by the bishop of Chester. But the more ancient books of the faculty office being all lost, we cannot certainly tell what effect these applications

Continuation & renewal of a commendam.

(*m*) 4 *Mod.* 212.

(*n*) *Noy* 94.

Commissary.

had; but of late years we find, that a temporary commendam of the bishop of Chester, which was in *retinere*, being expired, a new commendam of the same benefice was granted to him in perpetuity by *capere*, in consideration of the smallness of the said bishoprick, and the private patron's having otherwise disposed of the usual commendam, with which it had been formerly supported. *Gibf.* 915.

Resigning of a
commendam.

11. As to what hath been said of resigning commendams at pleasure; this may be of very ill consequence to the respective sees; many of which are poor, and cannot subsist without additional supports. And perhaps there are no other commendams so good, or so convenient; at least, if they are resigned, and other clerks be presented, there will be none vacant together with the bishoprick. And therefore it was a general instruction which king Charles the first sent to the bishops, not to resign their commendams; and we find a particular letter written by the king's order to the bishop of Peterborough, that he should not resign the living of Castor, which he held in commendam. *Gibf.* 915.

Commissary.

COMMISSARY is a title of jurisdiction, appertaining to him that exerciseth ecclesiastical jurisdiction in places of the diocese so far distant from the chief city, that the chancellor cannot call the people to the bishop's principal consistory court without great trouble to them. This commissary is called by the canonists *commissarius*, or *officialis foraneus*, and is ordained to this special end, that he should supply the office and jurisdiction of the bishop in the out places of the diocese, or in such parishes as are peculiar to the bishop, and exempted from the archdeacon's jurisdiction: for where by prescription or by composition there are archdeacons who have jurisdiction in their archdeaconries, as in most places they have, there the office of commissary is superfluous. *Terms of the law.* 4 *Inst.* 338.

The law concerning which officer, falling in with the law concerning chancellors, vicars general, and officials; the

Confirmation.

9

the whole is treated of together, under the title **Chancellor**.

Commission for pious uses. See **Charitable uses**.

Common prayer. See **Publick worship**.

Communion. See **Lord's Supper**.

Communion of the Sick. See **Sick**.

Communion table. See **Church**.

Commutation. See **Penance**.

Confession.

BY Can. 113. impowering ministers to present offences at the court of visitation, it is provided, that if any man confess his secret and hidden sins to the minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him, he shall not in any wise be bound by this constitution, but is straitly charged and admonished, that he do not at any time reveal and make known to any person whatsoever, any crime or offence so committed to his trust and secrecy (except they be such crimes as by the laws of this realm his own life may be called in question for concealing the same); under pain of irregularity.

Confirmation.

1. **I**N the office of publick baptism; the minister directeth the godfathers and godmothers to take care, that the child be brought to the bishop to be confirmed by him, so soon as he or she can say the creed, the Lord's prayer, and the ten commandments in the vulgar tongue, and be further instructed in the church catechism set forth for that purpose.

And by the rubrick at the end of baptism of those that are of riper years:—It is expedient that every person so baptized shall be confirmed by the bishop, so soon after his

Confirmation.

his baptism as conveniently may be; that so he may be admitted to the holy communion.

And by the rubrick before the office of confirmation;

— So soon as children are come to a competent age, and can say in their mother tongue the creed, the Lord's prayer, and the ten commandments, and also can answer to the other questions of the catechism, they shall be brought to the bishop.

2. By *Can. 60.* Forasmuch as it hath been a solemn ancient and laudable custom in the church of God, continued from the apostles times, that all bishops should lay their hands upon children baptized and instructed in the catechism of the christian religion, praying over them, and blessing them, which we commonly call confirmation, and that this holy action hath been accustomed in the church in former ages, to be performed in the bishop's visitation every third year; we will and appoint, that every bishop or his suffragan, in his accustomed visitation, do in his own person carefully observe the said custom. And if in that year, by reason of some infirmity, he be not able personally to visit; then he shall not omit the execution of that duty of confirmation the next year after, as he may conveniently.

3. By *Can. 61.* Every minister that hath cure and charge of souls, for the better accomplishing of the orders prescribed in the book of common prayer concerning confirmation, shall take especial care, that none shall be presented to the bishop for him to lay his hands upon, but such as can render an account of their faith according to the catechism in the said book contained. And when the bishop shall assign any time for the performance of that part of his duty, every such minister shall use his best endeavour to prepare and make able, and likewise to procure as many as he can to be then brought, and by the bishop to be confirmed.

And by the rubrick: Whensoever the bishop shall give knowledge for children to be brought unto him for their confirmation; the curate of every parish shall either bring or send in writing, with his hand subscribed thereunto, the names of all such persons within his parish, as he shall think fit to be presented to the bishop to be confirmed. And if the bishop approve of them, he shall confirm them, according to the form in the book of common prayer.

4. And every one shall have a godfather or a godmother, as a witness of their confirmation. *Rubr.*

And

Conge d' eslire.

11

And no person shall be admitted godfather or godmother to any child at confirmation, before the said person so undertaking hath received the holy communion. *Can.* 29.

5. Lord Coke says, If a man be baptized by the name of Thomas, and after at his confirmation by the bishop he is named John; his name of confirmation shall stand good. And this was the case of Sir Francis Gawdie, chief justice of the court of common pleas; whose name of baptism was Thomas, and his name of confirmation Francis; and that name of Francis by the advice of all the judges he did bear, and afterwards used in all his purchases and grants. 1 *Inst.* 3.

But this seemeth to be altered by the form of the present liturgy. In the offices of old, the bishop pronounced the name of the child or person confirmed by him, and if he did not approve of the name, or the person himself or his friends desired it to be altered, it might be done by the bishop's pronouncing a new name upon his ministering this rite, and the common law allowed the alteration; but upon review of the liturgy at king Charles the second's restoration, the office of confirmation is altered as to this point, for now the bishop doth not pronounce the name of the person confirmed, and therefore cannot alter it. *Johnf.* A. D. 1281. numb. 3.

6. By the rubrick at the end of the office of confirmation:—There shall be none admitted to the holy communion, until such time as they be confirmed, or be ready and desirous to be confirmed (o).

Conge d' eslire.

CONGE d' eslire, in the language of France, which was introduced into our laws by William the Norman and his successors, signifieth *leave to chuse*; and is the king's writ or licence to the dean and chapter to chuse a bishop, in the time of vacancy of the see.

Consecration of Churches. See Church.

(o) For the antiquity of confirmation see *De Conf. Diff.* V. and *12th. J. C.* 11. 4.

Con.

Consistory.

CONSISTORY is the court christian, or spiritual court, held formerly in the nave of the cathedral church, or in some chapel, isle or portico belonging to it; in which the bishop presided, and had some of his clergy for assessors and assistants. But this court now is held by the bishop's chancellor or commissary, and by archdeacons or their officials, either in the cathedral church or other convenient place of the diocese, for the hearing and determining of matters and causes of ecclesiastical cognizance, happening within that diocese. *Ken. Par. Ant. Gloss. God. 83.*

From the consistory the appeal is to the archbishop of the province. *God. 83.*

Consolidation of Churches. See Union.

Consultation.

CONSULTATION is a writ, whereby a cause being formerly removed by prohibition out of the ecclesiastical court or court christian, to the king's court, is returned thither again. For if the judges of the king's court, comparing the libel with the suggestion of the party, find the suggestion false, or not proved, and therefore the cause to be wrongfully called from the court christian; then, upon this consultation or deliberation, they decree it to be returned again; whereupon the writ in this case obtained, is called a consultation. Terms of the law.

Concerning which it is enacted by the statute intituled, "The statute of the writ of consultation", made in the 24 Ed. 1. as followeth: *Whereas ecclesiastical judges have often surceased to proceed in causes moved before them, by force of the king's writ of prohibition, in cases where remedy could not be given to complainants in the king's court, by any writ out of chancery, because that such plaintiffs were deferred of their right and remedy in both courts, as well temporal as spiritual, to their great damage, like as the king hath been advertised by the grievous complaint of his subjects; our lord the king willenb and commandeth, that where ecclesiastical judges do surcease in*
the

the aforesaid cases, by the king's prohibition directed unto them, that the chancellor or the chief justice of our Lord the king for the time being, upon sight of the libel of the same matter, at the instance of the plaintiff (if they can see that the case cannot be redressed by any writ out of the chancery, but that the spiritual court ought to determine the matters) shall write to the ecclesiastical judges before whom the cause was first moved, that they proceed therein, notwithstanding the king's prohibition directed to them before.

Upon sight of the libel] For (as it was heretofore held,) agreeable to the libel ought the consultation to be. And therefore in *Hofkins's* case, when the parson sued in the spiritual court for all the tithes, of such a ground, and the defendant obtained a prohibition, upon surmise that the queen had been seised of two parts of the tithes, and had granted them away, and that he had paid the two parts to the grantee, altho' the prohibition was for the two parts only, yet when the parson prayed consultation for the third part, it was denied; because his consultation could not be granted but according to his libel, and so he must libel for his third part de novo. But Hobart leaves a query on this case, whether he might not have had a consultation, as to the third part only. And the very next year, in *Berrie's* case, where the parson sued for tithes of hay in specie for a hundred acres; and in a prohibition issue was taken, whether the inhabitants had used to pay for all tithes of hay of all ancient meadows within the town a certain rate tithe; and the jury found there was such a custom for all the ancient meadows, saving for certain called Barton meadows, for which tithes had been paid in kind; and that the party who was sued for tithes in the spiritual court, had hay upon five acres of the Barton meadow; it was resolved, that if the jury had found against the custom generally, as they might well have done, the parson should have had his consultation for all; but however as they found the truth distributively, that he had cause to sue in the spiritual court for one part, but not for the other, he had consultation as to the Barton land; inasmuch as the libel for tithes in kind for the hundred acres, was several, for all or any part; and therefore for so much as was Barton, and out of the custom, it was as well libelled, as if it had been for that alone. *Gibf.* 1030. *Hob.* 115, 194.

The resolution upon this head, in *Fuller's* case, was as follows: When any libel in the ecclesiastical court contains many articles: if any of them do not belong to the cognizance

Consultation.

cognizance of the court christian, a prohibition may be granted generally; and upon motion made, consultation may be awarded as to things which do belong to the spiritual jurisdiction; for the writ of consultation with a *quoad*, is frequent and usual. 12 Co. 44.

If they can see that the case cannot be redressed] This supposeth strict examination of the matter; which is always made before consultation awarded. For consultations are the judgments of courts had upon deliberation, whereas prohibitions are granted upon surmises. To this purpose it was said by *Vaughan* chief justice, (*Vaugh.* 323.) "We find no record of prohibitions denied, for there is no entry made of motions not granted; but of prohibitions granted there is:" which makes the granting of a prohibition of no great authority, unless upon action brought a consultation be denied upon demurrer. *Gibf.* 1030.

It is on account of the great deliberation to be bestowed on these occasions, and its being an award of the court and final, that no consultation can be granted, though by all the judges, out of term; nor by any of them within the term, out of court, as was resolved in *Fuller's case*; and lord Coke says, the name of the writ imports this, that the court upon consultation amongst them ought to award it. *Gibf.* 1030. 12 Co. 41.

And by the 50 Ed. 3. c. 4. *Where a consultation is once duly granted upon a prohibition made to the judge of holy church, the same judge may proceed in the cause by virtue of the same consultation, notwithstanding any other prohibition thereupon to him delivered: Provided always, that the matter in the libel of the said cause be not ingrossed, enlarged, or otherwise changed.*

Where a consultation is once duly granted] *H. 42 Eliz. Sibley and Crawley.* On a prohibition for tithes; the defendant shewed, that before that time the plaintiff had sued in chancery, to stay it by English bill, and afterwards brought a prohibition there, and a consultation was there granted, and that this prohibition is for the same cause, namely, for matter of discharge; wherefore he prayed a consultation upon this statute, which requireth, that consultation being once duly granted, there shall not be another prohibition. But the court held, that this consultation was not duly granted according to the intent of the statute; because the prohibition was not duly grantable there, and so out of the statute: for it was not duly granted upon an English bill. And by the court, The statute is to be intended where the consultation is granted upon

upon examination of the matter, and not for the insufficiency of the proceedings. Whereupon it was awarded, that the prohibition should stand. *Cro. Eliz.* 736.

And afterwards, *E. 11 Jac.* in the case of *Tey and Cox*, we find it laid down as a rule by the whole court of king's bench, that if it be apparent matter, that the consultation was not duly granted, then a new prohibition may be granted. *2 Brownl.* 35. *Mod.* 917. *Gibf.* 1031.

Upon a prohibition made to the judge of holy church] But so, that the first consultation hath been granted upon the matter or substance of the suggestion, and not for default of form only. For in the case of *Cox and Seymour*, though the same suggestion had been made before, in four several prohibitions for the same land, and the same manner of tithing was alledged, and every of the four times consultation had been granted; yet, because it was in every instance only for default of proof within six months, through neglect to have the witnesses ready in due time according to Edward the sixth's statute of tithes, and not upon the right or trial of the custom; the suggestion was held to be good, and a fifth prohibition grantable. And in the case of *Stroud and Hoskins*, *H. 6 Cha. (p)* the same doctrine is laid down as follows: The statute of the 50 *Ed. 3.* is intended, where consultation is granted upon the substance of the suggestion, being proved to be insufficient in verdict, or non-suit after evidence; and not where it is granted for the insufficiency of the form of the suggestion, or in the proceeding thereupon. Which doctrine had been also laid down before, in the 7 *Jac.* in the court of king's bench (*q*); namely, when a consultation is granted upon any default of the prohibition in form, by misprision of the clerk, or by mispleading of any statute; in that case, or such like, a new prohibition may be granted upon the same libel: but if consultation be granted upon the right of the thing in question, there a new prohibition shall not be granted upon the same libel. *Gibf.* 1031.

But the next year, in the 8 *Jac.* in the case of *Dorwood and Brikinden (r)*, the court seems to have gone somewhat farther than bare form in the rule there laid down; viz.

(*p*) *Cro. Car.* 208.

(*q*) *2 Brownl.* 245. See also *2 Keb.* 719.

(*r*) *2 Brownl.* 26.

Consultation.

If a man libel for tithes for divers years, and a prohibition is granted for part of the years, and after that a consultation is awarded; yet the plaintiff may have a new prohibition for the residue of the time, notwithstanding the statute of the 50 *Ed.* 3. and that it be upon one self same libel. *Id.*

A case not unlike this, was *T. 1 W.* where a prohibition had been granted upon suggestion of a modus to pay 2d. for every lamb falling in the parish; after which, consultation was also granted: then there was a motion for a new prohibition, on suggestion of a modus of 2d. for every lamb falling in a particular farm of the same parish. And though it is there said, that if this modus had been found by the verdict, no consultation had been granted (1); yet the court inclined against a prohibition by reason of this statute. 2 *Vent.* 47.

The same judge may proceed in the cause] *Mefme le juge*: It was observed by Noy, in the case of *Bowry and Wallington* (1), that though in the printed books, and also in the extract of the statute in the time of *R.* 2. and in one roll remaining in the tower, it is *the same judge*; yet in the parliament roll itself, it is only *the ecclesiastical judge* in general: and he added, that if it were as in the printed books and extracts, yet this should not be intended the same personal judge, but the same judge of cognizance of the same jurisdiction or cause; so as no new prohibition shall be grantable, after consultation, though the bishop or archdeacon constitute a new judge, or the party appeal from an inferior to a superior court. Which doctrine is agreeable to the resolution in *Bigge's case*, in the 14 *Ja.* (2) where prohibition was prayed, upon an appeal, after consultation, but was denied; and the court said, that this act ought to have a reasonable construction, to be before the same judge, and for the same cause; that the appeal doth only suspend the sentence, but yet the same stands still in force; that if a new prohibition should be granted upon an appeal, then upon several appeals three or four prohibitions might be granted, which would be very inconvenient; and that the intent of the statute was, that

(1) Though the modus be not found as laid, yet if any modus be found, it is a sufficient ground for refusing a consultation. 1 *T. Rep.* 428. *Brock v. Richardson.*

(2) *Popb.* 159. *Palm.* 418.

(u) 3 *Bulst.* 182. *Moor.* 917.

he which hath but one suit, should not be infinitely troubled. *Gibf.* 1031.

It is true, in the case of *Davy* and *Cockam*, in the 22 *Ja.* (x) a new prohibition was prayed (and, as is said, obtained) after an appeal made; and that according to the reasoning of Jones, because although it was the same cause, and upon the same libel, yet it was before a new court. But it is to be observed, that the consultation there had been granted for lack of form (namely, upon default of proof within six months); in which case, as hath been already observed, a new prohibition after consultation may be granted to the very same judge, notwithstanding this statute. And though in the case of *Bowry* and *Wallington*, as it stands reported by Popham (y), it was resolved, that a new prohibition may be granted, if there be an appeal; yet this doth not contradict the former judgment, if we take in the two limitations that are there added; 1. That if he who appeals, prayeth a prohibition, he shall not have it; for then suits shall be deferred in infinitum in the ecclesiastical courts. Nor, 2. If the prohibition and consultation were upon the body of the matter, and the substance of it; for otherwise, he shall be put many times to try the same matter; which is full of vexation. *Gibf.* 1031.

Be not engrossed, enlarged, or otherwise changed] In the case of *Denton* and the countess of *Clanricard*, in the 18 *Ja.* where the first libel was, that tithes had been paid time out of mind; and the second libel was, that the tithes had been paid for twenty, thirty, or forty years, and time out of mind: this was adjudged a change of the libel, as laying the foundation of a new title different from the former; and the whole court said, that if they proceeded upon that addition, they would grant a prohibition. *Gibf.* 1031. (z)

But when the libel was for tithe milk of eight cows; and upon a *modus* pleaded, prohibition and injunction were obtained; and afterwards the same incumbent libelled for the same tithe against the same person, only inserting a less number of cows: this change in the libel

(x) 2 *Roll. Rep.* 500.

(y) *Poph.* 159.

(z) For this last allegation would have given a new title by prescription according to the civil law. 2 *Roll. Rep.* 207. 18 *Fin. Ab.* 57. See *Hob.* 298.

Convocation.

did not make it a different cause; and therefore attachment upon the prohibition was granted. *Gibf.* 1032. (a)

Conventicle. See Dissenters.

Convocation.

Convocation,
what.

1. **T**H^{O'} the word *convocation* be in itself of a general signification, and may indifferently be applied to any assembly which is summoned or called together, after an orderly manner; yet custom (which in these matters is wont to prevail) hath determined its sense to an ecclesiastical use, and made it if not only, yet principally, to be restrained to the assemblies of the clergy.

Before the con-
quest.

2. That the *bishop* of every diocese had here as in all other christian countries power to convene the clergy of his diocese, and in a common synod or council with them to transact such affairs as specially related to the order and government of the churches under his jurisdiction, is not to be questioned. These assemblies of the clergy were as old almost as the first settlement of christianity amongst us, and amidst all our other revolutions continued to be held till the time of king Henry the eighth.

What the bishop of every diocese did within his own district, the *archbishop* of each province, after the kingdom was divided into provinces, did within his proper province. They called together first the bishops, afterwards the other prelates, of their provinces; and by degrees added to these such of their inferior clergy, as they thought needful.

In these two assemblies of the clergy (the *diocesan synods* and *provincial councils*) only the spiritual affairs of the church were wont for a long time to be transacted. So that in this respect therefore, there was no difference between the bishops and clergy of our own and of all other christian churches. Our metropolitans and their suffragans acted by the same rules here, as they did in all other countries. They held these assemblies by the same power, convened the same persons, and did the same things in them.

When the papal authority had prevailed here, as in most other kingdoms and countries in Europe, by the leave of our kings and at the command of the legates sent from Rome, another and yet larger sort of councils were introduced among us, of the bishops and prelates of the whole realm. These were properly *national* church councils; and were wont to be held for some special designs, which either the pope, the king, or both, had to promote by them.

But besides these synods common to us with all other christian churches, and which were in their nature and end as well as constitution properly and purely ecclesiastical; two other assemblies there were of the clergy of this realm, peculiar to our own state and country: in which the clergy were convened, not for the spiritual affairs of the church, but for the good and benefit of the realm, and to act as members of the one as well as of the other. Now the occasion of these was this: When the faith of Christ was thoroughly planted here, and the piety of our ancestors had liberally endowed the bishops and clergy of the church with temporal lands and possessions; not only the opinion which they had of their prudence and piety prompted them to take the most eminent of them into their public councils, but the interest which they had by that means in the state made it expedient so to do, and to commit the direction and management of offices and affairs to them.

Hence our bishops first, and then some of our other prelates (as abbots and priors), were very early brought into the great councils of the realm, or *parliament*; and there consulted and acted together with the laity.

Thus were the greater clergy first brought into our state councils, and made a constant or established part of them. But in process of time, our princes began to have a further occasion for them. For being increased in number, and with that in their wealth too, not only our kings, but the people began to think it reasonable, that the clergy should bear a part in the public burdens, as well as enjoy their share of the public treasure.

Hence our Saxon ancestors, under whom the church was the most free, yet subjected the lands of the clergy to the threefold necessity, of castles, bridges, and expeditions. And the granting of aids in these cases, brought on assemblies of the clergy, which were afterwards distinguished by the name of *convocation*. Wake's State of the Ch. *passim*.

After the conquest till the reign of Edw. 1.

3. In the Saxon times, the lords spiritual (as well as the other clergy) held b. frankalmoigne, but yet made great part (as was said) of the grand council of the nation; being the most learned persons that, in those times of ignorance, met to make laws and regulations.

But William the conqueror turned the frankalmoigne tenures of the bishops and some of the great abbots into baronies; and from thenceforwards they were obliged to send persons to the wars, or were assessed to the escuage, (which was a fine or payment in money instead thereof,) and were obliged to attend in parliament. And then their attendance was complained of as a burden. And this begat the grand quarrel in Henry the second's time between the king and Thomas Becket. For the statute of Clarendon required such attendance, which confirmed the escuage on them. For this they made many exceptions; and particularly, that the parliament took cognizance of treasons and felonies; whereas the clergy, by a canon of the council of Toledo, were forbid to give judgment in cases of blood. And therefore to obviate this objection, the constitutions of Clarendon permitted them to withdraw in such cases.

Notwithstanding this concession, they still objected against the 13th article of that statute, which required them to be present until judgment was to be given.

This article obliged them to attend; and therefore though they had excepted the case of blood, yet they knew their attendance confirmed their estates as baronies; and they did not care that the munificence and frankalmoigne of the ancient kings should be changed into such tenures. But notwithstanding the quarrel with Becket, the king prevailed that they should continue baronies. *Gillb. Exch.* 44, 5, 6.

And the following princes in their parliaments taxed them in respect of their baronies, after the same manner that they did those of the laity.

Yet still, this reached only to the prelates and superior clergy; but the body of the clergy, that had no baronies, and holding by frankalmoigne, were in a great measure exempt from the charges which were assessed upon the laity, and were therefore by some other way to be brought under the same obligation.

In order hereunto several measures were taken, till at last they settled into that method which finally obtained, and set aside the necessity of any other way. First, the pope laid a tax upon the church for the use of the king; and

and both their powers uniting, the clergy were forced to submit to it. Next the bishops were prevailed with, upon some extraordinary occasions, to oblige their clergy to grant a subsidy to the king, in the way of a benevolence; and for this, letters of security were granted back by the king to them, to insure them that what they had done should not be drawn into example or consequence.

And these concessions were sometimes made by the bishops in the name of their clergy: but the common way was, that every bishop held a meeting of the clergy of his diocese. Then they agreed what they would do; and empowered first the bishops, afterwards their archdeacons, and finally proctors of their own, chosen for that end, to make the concession for them. *Wals: ut supra.*

4. Thus stood this matter till the time of Edward the first; who, not willing to continue at such a precarious rate with his clergy, took another method; and, after several other experiments, fixed at last upon an establishment, which hath in some sort continued ever since. The method he resolved upon was this: viz. That the earls and barons should be called to parliament as formerly, and embodied in one house: and that the tenants in burgage should send their representatives: and that the tenants by knight's service, and other socage tenants in the counties, should also send their representatives; and these were embodied in the other house. He designed to have the clergy as a third estate; and as the bishops were to sit *per baroniam* in the temporal parliament, so they were to sit with the inferior clergy in convocation. And the project and design of the king was, that as the two temporal estates charged the temporalities, and made laws to bind all temporal things within this realm; so this other body should have given taxes to charge the spiritual possessions, and have made canons to bind the ecclesiastical body: To this end was the *præmunientes* clause (so called from the first word thereof) in the summons to the archbishops and bishops, by which he required them to summon such of their inferior clergy to come with them to parliament, as he then specified and thought sufficient to act for the whole body of the clergy.

This altered the English convocation from the foreign synods; for these were totally composed of the bishops, who were pastors of the church; (for the clergy were regularly esteemed only their assistants;) and therefore the bishops only were collected to compose such foreign synods.

Convocation.

to declare what was the doctrine, or should be the discipline of the church.

Edward the first projected, to have made the clergy one third estate, dependant on himself; and therefore not only called the bishops, whom as barons he had a right to summon, but the rest of the clergy, that he might have their consent to the taxes and assessments made on that body.

But the clergy foreseeing they were likely to be taxed, alledged that they could not meet under a temporal authority, to make any laws or canons to govern the church. And this dispute was maintained by the archbishops and bishops, who were very loth the clergy should be taxed, or that they shou'd have any interest in making ecclesiastical canons, which formerly were made by their sole authority; for even if those canons had been made at Rome, yet, if they were not made in a general council, they did not think them binding here, unless they were received by some provincial constitution of the bishops. And though the inferior clergy, by this new scheme of Edward the first, were let into the power of making canons; yet they foresaw they were to be taxed, and therefore joined with the bishops, in opposing what they thought an innovation, and in the end paid no obedience to the *præmunientes* clause; but the archbishops and bishops threatened to excommunicate the king.

He, and the temporal estate, took it so ill, that the clergy would not bear any part of the publick charge, that they were beforehand with them, and the clergy were all outlawed, and their possessions seized into the king's hands.

This so humbled the clergy, that they at last consented to meet. And to take away all pretence, there was a summons, besides the *præmunientes* clause to the archbishop, that he should summon the bishops, deans, archdeacons, colleges, and the whole clergy, of his province. From hence therefore the bishops, deans, archdeacons, colleges, and clergy, met by virtue of the archbishop's summons; which being an ecclesiastical authority, they could not object to. And so the bishops and clergy came to convocation by virtue of the archbishop's summons; they esteeming it to be in his power, whether he would obey the king's writ or not: but when he had issued his summons, they could not pretend it was not their duty to come. But the *præmunientes* writ was not disused; because it directed the manner in which the clergy were to attend, to wit, the deans and archdeacons in person, the chapter by one, and the clergy by two proctors.

So

So that the clergy were doubly summoned; first by the bishop, to attend the parliament; and, secondly, by the archbishop, to appear in convocation. And that the archbishop might not appear to summon them solely in pursuance of the king's writ; he for the most part varied in his summons from the king's writ, both as to the time and place of their meeting.

And lest it might be thought still (of which they were very jealous) that their power was derived from temporal authority, they sometimes met on the archbishop's summons without the king's writ; and in such convocation the king demanded supplies, and by such request owned the episcopal authority of convening. So that the king's writ was reckoned by the clergy no more than one motive for their convening. And if the archbishop in his summons recited the king's writ, they protested against it, because that was laying his authority on the king's writ, which the clergy would by no means endure; for they would not consent that the prince had any ecclesiastical authority to convene synods, but they allowed the king's writ to be a motive for the archbishop to convene, if he agreed in judgment with the king.

And from henceforward, instead of making one state of the kingdom, as the king designed, they composed two ecclesiastical synods, under the summons of each of the archbishops; and being forced into those two synods before mentioned, they sat, and made canons by which each respective province was bound, and gave aids and taxes to the king. But the archbishop of Canterbury's clergy, and that of York, assembled each in their own province; and the king gratified the archbishops, by suffering this new body of convocation to be formed in the nature of a parliament. The archbishop sat as king; his suffragans sat in the upper house, as his peers; the deans, archdeacons, and the proctor for the chapter, represented the burghers; and the two proctors for the clergy, the knights of the shire. And so this body, instead of being one of the estates as the king designed, became an ecclesiastical parliament, to make laws, and to tax the possessions of the church. *Gilb. Exch. Ch. 4.*

But although they thus sat as a parliament, and made laws for the church, yet they did not make a part of the parliament properly so called. Sometimes indeed the lords, and sometimes the commons, were wont to send to the convocation for some of their body to give them advice in spiritual matters; but still this was only by way of advice:

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for the parliament have always insisted, that their laws, by their own natural force, bind the clergy; as the laws of all christian princes did in the first ages of the church. *Gilb. Exch.* 60.

And even the convocation tax did always pass both houses of parliament; since it could not bind as a law, till it had the consent of the legislature. *Gilb. Exch.* 197.

Even so in the Saxon times, if the subject of any laws was for the outward peace and temporal government of the church; such laws were properly ordained by the king and his great council of clergy and laity intermixed, as our acts of parliament are still made. But if there was any doctrine to be tried, or any exercise of pure discipline to be reformed, then the clergy of the great council departed into a separate synod, and there acted as the proper judges. Only when they had thus provided for the state of religion, they brought their canons from the synod to the great council, to be ratified by the king, with the advice of his great men, and so made the constitutions of the church to be laws of the realm.—And the Norman revolution made no change in this respect. *Ken. Ecc.* Syn. 249.

The act of submission of the 25 Hen. 8.

5. Thus the case stood, when the act of submission, 25 H 8. c. 19. was made; by which it is enacted as followeth: *Where the king's humble and obedient subjects the clergy of this realm of England, have not only acknowledged, according to the truth, that the convocation of the same clergy is, always hath been, and ought to be assembled only by the king's writ; but also submitting themselves to the king's majesty, have promised in verbo sacerdotii that they will never from henceforth presume to attempt, alledge, claim, or put in ure, enact, promulge, or execute any new canons, constitutions, ordinances, provincial, or other, or by whatsoever name they shall be called, in the convocation, unless the king's most royal assent and licence may to them be had, to make, promulge, and execute the same, and that his majesty do give his most royal assent and authority in that behalf; It is therefore enacted, according to the said submission, that they nor any of them shall presume to attempt, alledge, claim, or put in ure any constitutions or ordinances provincial, by whatsoever name or names they may be called, in their convocations in time coming (which always shall be assembled by authority of the king's writ) unless the same clergy may have the king's most royal assent and licence, to make, promulge, and execute such canons, constitutions, and ordinances, provincial or synodal:*
upon

upon pain of every one of the said clergy doing contrary to this act, and being thereof convicted, to suffer imprisonment, and make fine at the king's will.

Accordingly, *T. 8 Ja.* It was resolved upon this statute, by the two chief justices and divers other justices, at a committee before the lords in parliament; 1. That a convocation cannot assemble at their convocation without the assent of the king. 2. That after their assembly they cannot confer, to constitute any canons without licence of the king. 3. When they upon conference conclude any canons, yet they cannot execute any of their canons without the royal assent. 4. That they cannot execute any after the royal assent, but with these four limitations; (1) that they be not against the prerogative of the king; nor (2) against the common law; nor (3) against any statute law; nor (4) against any custom of the realm. All which appeareth by the said statute: And this (Coke says) was but an affirmance of what was before the said statute; for it was held before, that if a canon be against the law of the land the bishop ought to obey the commandment of the king, according to the law of the land. *12 Co. 72.*

And therefore by this act the clergy being restrained from making any canons or constitutions in their convocations without the king's licence, the power as to this particular, which was before lodged in the hands of the metropolitan, is now put into the hands of the king, who having by authority of his writ commanded the archbishops to summon them for state purposes (as the tenor of his writ shews), has it now in his own breast whether he will let them act at all as a church synod or no. They are a convocation by the writ of summons, but a council properly speaking they are not, nor can they legally act as such till they have obtained the king's licence so to do. *Wake: ut supra.*

6. Only parsons, vicars, and perpetual curates, are ^{Election.} capable of giving their votes in chusing proctors for the diocesan clergy. *Johns. 150.*

If any member of the convocation, who is a proctor, dies; the archbishop issues his mandate to the bishop of that diocese to elect another; and this, by virtue of the power inherent in him to summon his suffragan bishops; who being to obey him in all things lawful and honest, and the clergy their bishop in the like manner, they by that command make an election to supply the place of one of their proctors. *Gill. Exch. 58, 59.*

7. In

Number.

7. In the province of Canterbury there are only two proctors returned for each diocese: in those dioceses where there are several archdeaconries, two are nominated by the clergy of each archdeaconry; and out of these, two are chosen to serve as proctors for the whole diocese. But in the province of York, two proctors are sent to convocation for every archdeaconry; otherwise the number would be so small, as scarce to deserve the name of a provincial synod. By this means it comes to pass, that the parochial clergy have as great an interest in convocation there, as the cathedral clergy. Whereas in the province of Canterbury, the lower house of convocation consisteth of twenty-two deans (taking in Westminster and Windsor), twenty-four proctors of the chapters, fifty-three archdeacons, in the whole ninety-nine of the cathedral clergy; and there are but at the same time forty-four proctors for the parochial clergy. *Johns.* 150. *Waks* 34.

Two houses.

8. Anciently the lower clergy sat in the same house with the bishops; and in the province of York, the bishops and other clergy do sit in the same house still. *Johns.* 149.

But in the province of Canterbury (as hath been said), they consist of two houses; the upper house, where the archbishop and bishops sit; and the lower house, where the rest do sit. 4 *Inst.* 322.

And as there are two houses of convocation, so there are two prolocutors, one of the bishops of the higher house, chosen by that house: another of the lower house, and presented to the bishops, for their prolocutor. 4 *Inst.* 323.

Privilege.

9. By the statute of 8 Hen. 6. c. 1. *Because the prelates and clergy of the realm called to the convocation, and their servants and familiars that come with them to such convocation, oftentimes be arrested, molested, and inquieted; our lord the king, willing to provide for the security and quietness of the said prelates and clergy, at the supplication of the same prelates and clergy, and by the assent of the great men and commons of the realm, both ordained and established, that all the clergy hereafter to be called to the convocation by the king's writ, and their servants and familiars, shall for ever hereafter fully use and enjoy such liberty or defence in coming, tarrying, and returning, as the great men and commonalty of the realm, called or to be called to the king's parliament, do enjoy, and were wont to enjoy, or in time to come ought to enjoy.*

And

And in the journals of the house of lords, we find several applications to their lordships for redress in cases where this liberty of the convocation clergy hath been invaded; which their lordships have accordingly granted. *Gibf.* 931.

10. In convocation, those who are absent, by leave or *Proxies* connivance, are allowed to vote by proxy; and the bishops who hold lesser dignities in commendam, can constitute any person that is member of the lower house to vote there as their proxy, for such deanries or archdeaconries as they hold by commendam. *Johns.* 142.

11. *Can.* 139. Whosoever shall affirm, that the sacred *General power.* synod of this nation in the name of Christ, and by the king's authority assembled, is not the true church of England by representation; let him be excommunicated, and not restored until he repent and publicly revoke that his wicked error.

Can. 140. Whosoever shall affirm, that no manner of person, either of the clergy or laity, not being themselves particularly assembled in the said sacred synod, are to be subject to the decrees thereof in causes ecclesiastical (made and ratified by the king's supreme authority) as not having given their voices unto them; let him be excommunicated, and not restored until he repent and publicly revoke that his wicked error.

Can. 141. Whosoever shall affirm, that the sacred synod assembled as aforesaid, was a company of such persons as did conspire together against godly and religious professors of the gospel, and that therefore both they and their proceedings, in making of canons and constitutions in causes ecclesiastical by the king's authority as aforesaid, ought to be despised and contemned, the same being ratified confirmed and enjoined by the said regal power supremacy and authority; let them be excommunicated, and not restored until they repent and publicly revoke that their wicked error.

12. Lord Coke says, a convocation may make consti- *No power to*
tutions, by which those of the spirituality shall be bound, *bind the tempo-*
for this, that they all, either by representation or in per- *ralty.*
son, are present; but not the temporality. *12 Co.* 73.

And in the case of *Matthews and Burdett*, *H 1 Ann.* In the primitive church, the laity were present at all synods. When the empire became christian, no canon was made without the emperor's consent. The emperor's consent included that of the people; he having in himself the whole legislative power, which our kings have not.

The

Convocation.

Therefore if the king and clergy make a canon, it binds the clergy in *re ecclesiastica*, but it doth not bind laymen; they are not represented in convocation, their consent being neither given nor asked. 2 *Salk.* 412.

And in *Cox's* case, *M.* 1700. By Wright lord keeper: The canons of a convocation do not bind the laity without an act of parliament. 1 *Peere W.* 32.

And finally, in the case of *Middleton and Croft*, *M.* 10 *Geo.* 2. it was determined by the unanimous resolution of the court of king's bench, that such canons do not proprio vigore bind the laity. *Str.* 1056.

Not against the law of the land. 13. The convocation can do nothing against the law of the land; for no part of the law, be it common law, or statute law, can be abrogated or altered without act of parliament. 12 *Cj.* 73.

And by the statute of 25 *H.* 8. c. 19. it is provided, that no canons, constitutions, or ordinances shall be made or put in execution within this realm, by authority of the convocation of the clergy, which shall be contrariant or repugnant to the king's prerogative royal, or the customs, laws, or statutes of this realm (*b*).

Appeal to the convocation.

14. By the 24 *H.* 8. c. 12. (concerning appeals) it is enacted, that in all causes testamentary, matrimonial, or of tithes, depending in the ecclesiastical courts, which shall touch the king, the party grieved may appeal to the upper house of convocation being then convocate by the king's writ, or next ensuing, within the province; so that such appeal be taken by the party grieved within fifteen days next after judgment given: and that determination shall be final, so as that the matter so determined shall never after come in question and debate, to be examined in any other court.

Continuance.

15. The convocation usually continueth during the time of parliament; but as Dr. Warner observes the parliament and convocation are separate bodies, independent on one another, and called together by different writs; and therefore the dissolution of the parliament doth not necessarily, or in any respect, dissolve the convocation; so that they may continue to sit longer than the parliament if the king pleases. 2 *Warn.* 535.

Their decline.

16. Finally, the clergy having continued to tax themselves in convocation as aforesaid, these assemblies were

(*b*) This statute was declaratory of the old common law. 12 *Rep.* 72. 1 *Bl. Com.* 279.

regularly

regularly kept up till the act of the 13 C. 2. c. 4. was passed, when the clergy gave their last subsidy; it being then judged more advantageous to continue the taxing them by way of a land tax and poll tax, as it had been in the time of the long parliament during the civil wars. *Gilb. Exch.* 56.

And in the year 1664, by a private agreement between Sheldon archbishop and the lord chancellor Clarendon and other the king's ministers, it was concluded, that the clergy should silently wave the privilege of taxing their own body, and permit themselves to be included in the money bills prepared by the commons. And this hath made convocations unnecessary to the crown, and inconsiderable in themselves. 2 *Warn.* 611, 612.

And since that time the clergy have been allowed to vote in chusing knights of the shire, as other freeholders, which in former times they did not. *Johns.* 150.

And from that time the convocation hath never passed any synodical act; and from thenceforth until the year 1700, for the most part they were only called, and very rarely did so much as meet together in a full body, and with the usual solemnity. It is true that during the remainder of king Charles the second's reign, when the office of prolocutor was void by death or promotion, so many of the lower house came together as were thought sufficient to chuse a new one; and those members that were about the town commonly met, during parliament, once a week, had prayers read, and were formally continued till the parliament was dissolved, and the convocation together with it. And in king James the second's time, the writs issued out of course, but the members did not meet. In the year 1689, after the accession of king William and queen Mary to the throne, a convocation was not only called, but began to sit in due form; but their resolutions came to nothing. And from thence till the year 1700, they were only called, but did not meet: but in that year, and ever since, at the meeting of the parliament, the convocation of the clergy hath likewise been solemnly opened, and the lower clergy have been permitted to form themselves into a house, and to chuse their prolocutor; nor have they been finally dismissed so soon as that solemnity was over, but continued from time to time, till the parliament hath broke up or been dissolved. And now it seems to be agreed, that they are of right to be assembled concurrently with parliaments, and may act and proceed as provincial councils, when

Courts.

when his majesty in his royal wisdom shall judge it expedient. *Johns.* 141, 2, 3.

Cope.

C O P E signifieth in general a canopy, or vaulted covering; and from thence seemeth to have been transferred to denote that vestment of the priests, which covereth the back and shoulders.

Corody.

A Corody is an allowance of meat, bread, drink, money, cloathing, lodging, and such like necessaries for sustenance. *Terms of the law.*

It is sometimes certain, where the certainty of things is set down; sometimes uncertain, where the certainty is not set down. *Id.*

Some corodies began by grant made by one man to another; and some are of common right, as every founder of abbies or religious houses had authority to assign such in the said houses for such persons as he should appoint. *Id.*

Corodies are turned into pensions and money at this day. *Wood, b. 2. c. 2.*

Corse present. See *Portuarp.*
Council. See *Synod.*

Courts.

T H I S title treateth only of the jurisdiction of the ecclesiastical courts in general; the law concerning the several particulars, is inserted under the respective titles:

titles: as concerning the several kinds of courts, under the titles, *consistory, convocation, visitation, arches, audience, prerogative, faculty, peculiar*; concerning the officers, under the titles *archdeacon, chancellor, commissary, vicar general, official, surrogate, advocate, register, proctor, apparitor*; concerning the practice and manner of proceeding, under the titles *caveat, libel, citation, evidence, sentence, fees, appeal, prohibition, consultation*; concerning the judgment and execution of the sentence, under the titles *penance, suspension, excommunication, interdict, deprivation, degradation, sequestration*; and such like.

1. For the first three hundred years after Christ, the distinction of ecclesiastical or spiritual causes, in point of jurisdiction, did not begin; for at that time no such distinction was heard of in the christian world; for the causes of testaments, matrimony, bastardy, adultery, and the rest, which are called ecclesiastical or spiritual causes, were merely civil, and determined by the rules of the civil law, and subject only to the jurisdiction of the civil magistrate. But after the emperors were become christian, out of a zeal and desire they had to grace and honour the learned and godly bishops of that time, they were pleased to single out certain special causes, wherein they granted jurisdiction to bishops; namely, in cases of tithes, because paid to men of the church; in causes of matrimony, because marriages were for the most part solemnized in the church; in causes testamentary, because testaments were many times made *in extremis*, when churchmen were present giving spiritual comfort to the testator, and therefore they were thought the fittest persons to take the probates of such testaments: and so of the rest. Yet these bishops did not then proceed in these causes according to the canons and decrees of the church, (for the canon law was not then made,) but according to the rules of the imperial law, and as the civil magistrate proceeded in other causes. *Dav. 95.*

2. Accordingly in this kingdom, in the Saxon times, before the Norman conquest, there was no distinction of jurisdictions; but all matters, as well spiritual as temporal, were determined in the county court called the sheriff's tourn, where the bishop and earl (or in his absence the sheriff) sat together; or else in the hundred court, which was held in like manner before the lord of the hundred and ecclesiastical judge. *Examin. of the scheme of ch. pow. 15. Duck. 307. 1 Warn. 274. 2 Still. 14. God. 96. Jibnsf. 246.*

For

Courts.

For the ecclesiastical officers took their limits of jurisdiction, from a like extent of the civil powers. Most of the old Saxon bishopricks were of equal bounds with the distinct kingdoms. The archdeaconries, when first settled into local districts, were commonly fitted to the respective counties. And rural deaneries, before the conquest, were correspondent to the political tithings. Their spiritual courts were held, with a like reference to the administration of civil justice. The synods of each province and diocese were held at the discretion of the metropolitan and the bishop, as great councils at the pleasure of the prince. The visitations were first united to the civil inquisitions in each county; and afterwards, when the courts of the earl and bishop were separated, yet still the visitations were held like the sheriff's tourns twice a year, and like them too after easter and michaelmas, and still with nearer likeness the greater of them was at easter. The rural chapters were also held like the inferior courts of the hundred, every three weeks; then, and like them too, they were changed into monthly, and at last into quarterly meetings. Nay, and a prime visitation was held commonly, like the prime solcmote or sheriff's tourn on the very calends of May. *Ken. Eccl. Syn.* 233, 4.

And accordingly Sir Henry Spelman observes, that the bishop and the earl sat together in one court, and heard jointly the causes of church and commonwealth; as they yet do in parliament. And as the bishop had twice in the year two general synods, wherein all the clergy of his diocese of all sorts were bound to resort for matters concerning the church; so also there was twice in the year a general assembly of all the shire for matters concerning the commonwealth, wherein without exception all kinds of estates were required to be present; dukes, earls, barons, and so downward of the laity; and especially the bishop of that diocese among the clergy. For in those days the temporal lords did often sit in synods with the bishops, and the bishops in like manner in the courts of the temporality, and were therein not only necessary, but the principal judges themselves. Thus by the laws of king Canutus, "the shyre-gemot (for so the Saxons called this assembly of the whole shire) shall be kept twice a year and oftner if need require, wherein the bishop and the alderman of the shire shall be present, the one to teach the laws of God, the other the law of the land." And among the laws of king Henry the first, it is ordained; "first, let the laws of true christianity (which

we call the ecclesiastical) be fully executed with due satisfaction; then let the pleas concerning the king be dealt with; and lastly, those between party and party: and whomsoever the church synod shall find at variance, let them either make accord between them in love, or sequester them by their sentence of excommunication." Whereby it appeareth, that ecclesiastical causes were at that time under the cognizance of this court. But these, he says, he takes to be such ecclesiastical causes, as were grounded upon the ecclesiastical laws made by the kings themselves for the government of the church (for many such there were in almost every king's reign), and not for matters rising out of the Roman canons which haply were determinable only before the bishop and his ministers.—And the bishop first gave a solemn charge to the people touching ecclesiastical matters, opening unto them the rights and reverence of the church, and their duty therein towards God and the king, according to the word of God. Then the alderman in like manner related unto them the laws of the land, and their duty towards God, the king, and commonwealth, according to the rule and tenure thereof. *Reliquiæ Spelm.* 13, 53, 54.

3. The separation of the ecclesiastical from the temporal courts, was made by William the conqueror. And as from thence we are to date this great alteration in our constitution; it is judged necessary to recite the charter of separation verbatim; which is as followeth:

"WILLIELMUS, Dei gratia, rex Anglorum, R. Baimardo et G. de Magnavilla, et P. de Valoines, cæterisque meis fidelibus de Essex et Hertfordshire et de Middlesex, salutem. Sciatis vos omnes, et cæteri mei fideles qui in Anglia manent, quod episcopales leges, quæ non bene, nec secundum sanctorum canonum præcepta, usque ad mea tempora in regno Anglorum fuerunt, communi concilio et concilio archiepiscoporum [meorum] et [ceterorum (c)] episcoporum, et abbatum, et omnium principum regni mei, emendandas judicavi. Propterea mando, et regia auctoritate præcipio, ut nullus episcopus, vel archidiaconus, de legibus episcopalibus amplius in Hundret placita teneant; nec causam quæ ad regimen animarum pertinet, ad iudicium sæcularium hominum adducant: sed quicunque secundum episcopales leges, de quacunque causa vel culpa interpellatus fuerit, ad locum quem ad hoc episcopus elegerit et nominaverit, veniat; ibique de causa vel culpa sua respondeat, et non secundum Hundret, sed secundum

William the
conqueror's
charter of separation.

canones et episcopales leges, et rectum Deo et episcopo suo faciat. Si vero aliquis, per superbiam elatus, ad justitiam episcopalem venire contempserit, et noluerit; vocetur semel, et secundo, et tertio: Quod si nec sic ad emendationem venerit, excommunicetur; et si opus fuerit ad hoc vindicandum, fortitudo et justitia regis vel vicecomitis adhibeatur: Ille autem qui vocatus ad justitiam episcopi venire noluerit, pro unaquaque vocatione legem episcopalem emendabit. Hoc etiam defendo, et mea auctoritate interdicto, ne ullus vicecomes aut præpositus, seu minister regis, nec aliquis laicus homo, de legibus quæ ad episcopum pertinent, se intromittat; nec aliquis laicus homo alium hominem sine justitia episcopi ad judicium adducat: Judicium vero in nullo loco portetur, nisi in episcopali sede, aut in illo loco, quem episcopus ad hoc constituerit." *Spelm.* V. 2. p. 14. (d)

(d) WILLIAM, by the grace of God king of the English, to R. Bainard, and G. De Magnavilla and P. De Valoines, and to my other liege men of Essex and Hertfordshire and of Middlesex, health. Know ye all and other my liege men who dwell in England, that the episcopal laws which have not been well (administered) nor according to the precepts of the holy canons, up to my time, in the kingdom of England, I have thought fit to have amended in a common council and council of my archbishops and other bishops and abbots, and all the principal men of my kingdom. I therefore order and by royal authority command that no bishop or archdeacon longer hold pleas of the laws episcopal in the hundred, or draw a cause which belongs to the government of souls to the judgment of secular men: but whosoever shall be questioned, according to the episcopal laws, touching any cause or fault whatsoever, let him come to a place which the bishop for this shall have chosen and named, and there let him answer touching his cause or fault; and not according to the hundred, but according to the canons and episcopal laws, let him do right both to God and his bishop. But if any one elated through pride shall have contemned or refused to come to the episcopal jurisdiction, let him be summoned once and a second and third time; and if he shall not then come to make amends, let him be excommunicated. And if need shall be to enforce this, let the power and jurisdiction of the king or sheriff be resorted to: and he who having been summoned to the jurisdiction of the bishop shall have refused to come, shall make amends to the episcopal law for every summons. This also I forbid and by my authority interdict, that no sheriff or reeve or officer of the king, nor any layman, do intermeddle with the laws which belong to the bishop: nor any layman do draw another man to judgment except by the jurisdiction of the bishop: and let judgment be given in no place but in the episcopal seat, or in that place which the bishop for this shall have appointed.

This

This charter, Mr. Selden says, was recited in a close roll of king Richard the Second. and then confirmed. *Sir.* 669.

4 For upon the conquest made by the Normans, the pope took the opportunity to usurp upon the liberties of the crown of England. For the conqueror came in with the pope's banner, and under it won the battle. Whereupon the pope sent two legates into England, with whom the conqueror called a synod, deposed Stigand archbishop of Canterbury because he had not purchased his pall from Rome, and displaced many bishops and abbots to make room for his Normans. This admission of the pope's legates, first led the way to his usurped jurisdiction in England; yet no decrees passed or were put in execution, touching matters ecclesiastical, without the royal assent; nor would the king submit himself in point of fealty to the pope, as appears by his epistle to Gregory the seventh. Yet in his next successor's time, namely in the time of king William Rufus, the pope by Anselme archbishop of Canterbury attempted to draw appeals to Rome, but prevailed not. Upon this occasion it was, that the king told Anselme, that none of his bishops ought to be subject to the pope, but the pope himself ought to be subject to the emperor; and that the king of England had the same absolute liberty in his dominions, as the emperor had in the empire. Yet in the time of the next king, to wit, king Henry the first, the pope usurped the patronage and donation of bishopricks, and of all other benefices ecclesiastical. At which time Anselme told the king, that the patronage and investiture of bishops was not his right, because pope Urban had lately made a decree, that no lay person should give any ecclesiastical benefice. And after this, at a synod held at London, in the year 1107, a decree was made, unto which the king assented (saith Matthew Paris), that from thenceforth no person should be invested in a bishoprick by the giving of a ring and pastoral staff (as had been before), nor by any lay hand. Hereupon the pope granted, that the archbishop of Canterbury for the time being should be for ever *legatus natus*: and Anselme for the honour of his see obtained, that the archbishop of Canterbury should in all general councils sit at the pope's foot, as *alterius orbis papa*, or pope of this part of the world. Yet after Anselme's death, this same king gave the archbishoprick of Canterbury to Rodolph bishop of London, and invested him by the ring and pastoral staff; and this, because the succeeding popes had broken pope Urban's promise, touching the not sending of legates into England, unless the king should require it.

Papal Inroads
ments after the
conquest.

And in the time of the next succeeding king, to wit, king Stephen, the pope gained appeals to the court of Rome; for in a synod at London, convened by Henry bishop of Winchester the pope's legate, it was decreed, that appeals should be made from provincial councils to the pope: before which time, appeals to Rome were not in use. Thus did the pope usurp three main points of jurisdiction, upon three several kings after the conquest (for of king William Rufus he could gain nothing), viz. upon the conqueror, the sending of the legates or commissioners to hear and determinē ecclesiastical causes; upon Henry the first, the donation and investiture of bishopricks and other benefices; and upon king Stephen, the appeals to the court of Rome. And in the time of king Henry the second, the pope claimed exemption of clerks from the secular power. And, finally, in the time of king John, he took the crown from off the king's head, and compelled him to accept his kingdom from the pope's donation. *God. 96.*

Opposed by the
statutes of
provisors.

5. Nevertheless all this obtained not without violent struggle and opposition: and this caused the statutes of provisors to be made, in the reigns of king Edward the third and king Richard the second. By the former of which, (namely, the statute of the 27th Ed. 3. c. 1.) it is enacted as followeth:

Because it is shewed to our lord the king, by the grievous and clamorous complaints of the great men and commons of the realm, how that divers of the people be drawn out of the realm, to answer of things whereof the cognizance pertaineth to the king's court; and also that the judgments given in the same court be impeached in another court, in prejudice and disorder of our lord the king and of his crown and of all the people of his said realm, and to the undoing and destruction of the common law of the same realm at all times used: Whereupon, upon good deliberation had with the great men and other men of his said council, it is assented and accorded, that all the people of the king's ligeance of what condition that they be, which shall draw any out of the realm in plea, whereof the cognizance pertaineth to the king's court, or of things whereof judgments be given in the king's court, or which do sue in any other court to defeat or impeach the judgments given in the king's court, shall have a day, containing a space of two months, by warning to be made to them, to appear before the king and his council, or in his chancery, or before the king's justices of the one bench or the other, or before other the king's justices which to the same shall be deputed, to answer in their proper persons to the king, of the contempt done in this behalf. And if they come not at the said day in their proper person to be at the law, they,

they, their procurators, attornies, executors, notaries, and maintainers, shall from that day forth be put out of the king's protection, their lands and goods forfeit to the king, and their bodies wheresoever they may be found shall be taken and imprisoned and ransomed at the king's will, and upon the same a writ shall be made to take them by their bodies, and to seize their lands goods and possessions into the king's hands; and if it be returned that they be not found, they shall be put in excommunicat and outlawed. Provided, that at what time they come before they be outlawed, and will yield them to the king's prison to be justified by the law, and to receive that which the court shall award in this behalf, they shall be thereto received; the forfeiture of lands and goods abiding in their force, if they do not yield them within the said two months as is aforesaid.

And by the other statute, viz. 16 Ric. 2. c. 5. (which the pope called *excecrabile statutum*, and the passing thereof *seductio et turpe facinus*) it is enacted, that if any shall purchase or pursue, or cause to be purchased or pursued, in the court of Rome or elsewhere, any translations of prelates, processes, sentences of excommunication, bulls, instruments, or any other things whatsoever which touch the king, against him, his crown and his regality, or his realm; and they which bring within the realm or them receive, or make thereof notification, or any other execution whatsoever within the said realm or without: they, their notaries, procurators, maintainers, abettors, fautors, and counsellors, shall be put out of the king's protection, and their lands and goods forfeited to the king, and they shall be attached by their bodies if they may be found, and brought before the king and his council, there to answer to the cases aforesaid, or process shall be made against them by *præmunire facias*, in manner as it is contained in other statutes of provisors; and other which do sue in any other court in derogation of the regality of our lord the king.

They are called *other courts* (lord Coke says), either because they proceed by the rules of other laws, as by the canon or civil law; or by other trials than the common law doth warrant. For the trial warranted by the law of England for matters of fact, is by verdict of twelve men before the judges of the common law of matters pertaining to the common law, and not upon examination of witnesses in any court of equity. So as those *other courts* are either such as are governed by *other laws*, or such as draw the party to *another kind of trial*. 3 Inst. 120.

And where the statute of the 16 R. 2. saith, "in the court of Rome or elsewhere;" (altho' it may seem to be meant and conceived of the places of remove which the popes used in those days, being sometimes at Rome in

Italy, sometimes at Avignon in France, sometimes in other places, as by the date of the bulls and other proceedings in that age may be seen :) yet this expression, he saith, doth include also the ecclesiastical and other courts within this realm, for matters which belong to the cognizance of the common law; as where a bishop deprives an incumbent of a donative; or excommunicates a man for hunting in his parks; or where commissioners of sewers imprison a man for not releasing a judgment at law. 3 *Inst.* 120. *Rid.* 167. 1 *Haw.* 51.

But it seemeth, that the suit in these courts for a matter which appears not by the libel itself, but only by the defendant's plea or other matter subsequent to be of temporal cognizance (as where a plaintiff libels for tithes, and the defendant pleads that they were severed from the nine parts, by which they become a lay fee), is not within the statute, because it appears not that either the plaintiff or the judge knew that they were severed. 1 *Haw.* 52.

Abolished in the reign of King Henry the eighth; and the king declared to be the supreme head and fountain of jurisdiction.

6. Afterwards (upon the dawn of the reformation) by the statute of the 24 Hen. 8. c. 12. it is recited as followeth: *Where by divers sundry old authentic histories and chronicles, it is manifestly declared and expressed that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having dignity and royal estate of the imperial crown of the same; unto whom a body politick compact of all sorts and degrees of people, divided in terms and by names of spirituality and temporality, been bounden and owen, to bear next to God, a natural and humble obedience; he being also institute and furnished, by the goodness and sufferance of almighty God, with plenary whole and intire power preeminence authority prerogative and jurisdiction, to render and yield justice and final determination, to all manner of folk resiants or subjects within this his realm, in all causes matters debates and contentions happening to occur insurge or begin within the limits thereof, without restraint or provocation to any foreign princes or potentates of the world; the body spiritual whereof having power, when any cause of the law divine happened to come in question, or of spiritual learning, that it was declared interpreted and shewed by that part of the said body politick, called the spirituality, now being usually called the english church, which always hath been reputed, and also found of that sort, that both for knowledge integrity and sufficiency of number, it hath always been thought, and is also at this hour, sufficient and meet of itself, without the intermeddling of any exterior person or persons, to declare and determine all such doubts, and to administer all such offices and duties, as to their rooy spiritual doth appertain: for the due administration*

tion whereof, and to keep them from corruption and sinister affection, the king's most noble progenitors, and the antecessors of the nobles of this realm, have sufficiently endowed the said church, both with honour and possessions; and the laws temporal for trial of property of lands and goods, and for the conservation of the people of this realm in unity and peace, without rapine or spoil, were and yet are administered adjudged and executed by sundry judges and ministers of the other part of the said body politick, called the temporality, and both their authorities and jurisdictions do conjoin together in the due administration of justice, the one to help the other.

And accordingly, lord Coke, treating of the king's ecclesiastical laws, saith as followeth: By the ancient laws of this realm, this kingdom of England is an absolute empire and monarchy, consisting of one head, which is the king, and of a body politick, compact and compounded of many and almost infinite several and yet well agreeing members. All which the law divideth into two general parts, that is to say, the clergy and laity, both of them next and immediately under God subject and obedient to the head. Also the kingly head of this politick body is instituted and furnished with plenary and intire power prerogative and jurisdiction, to render justice and right to every part and member of this body, of what estate, degree, or calling soever, in all causes ecclesiastical or temporal; otherwise he should not be a head of the whole body. And as in temporal causes, the king by the mouth of his judges in his courts of justice doth judge and determine the same by the temporal laws of England; so in causes ecclesiastical and spiritual, as namely, blasphemy, apostacy from christianity, heresies, schisms, ordering admissions, institutions of clerks, celebration of divine service, rights of matrimony, divorces, general bastardy, subtraction and right of tythes, oblations, obventions, dilapidations, reparation of churches, probate of testaments, administrations and accounts upon the same, simony, incests, fornications, adulteries, solicitation of chastity, pensions, procurations, appeals in ecclesiastical cause, commutation of penance, and others, (the cognizance whereof belongeth not to the common laws of England,) the same are to be determined and decided by ecclesiastical judges, according to the king's ecclesiastical laws of this realm. For as the Romans, fetching divers laws from Athens, yet being approved and allowed by the state there, called them notwithstanding the civil law of the Romans; and as the Normans, borrowing all or most of their laws from England, yet stiled them by the name of the laws

or customs of Normandy; so albeit the kings of England derived their ecclesiastical laws from others, yet so many as were approved and allowed here, by and with a general consent, are aptly, and rightly called The king's ecclesiastical laws of England; which whosoever shall deny, he denieth that the king hath plenary power to deliver justice in all causes to all his subjects, or to punish all crimes and offences within his kingdom, for that the deciding of matters so many and of so great importance, are not within the cognizance of the common laws; which to deny, doth import that the king is no compleat monarch nor head of the whole and intire body of the realm. *5 Co. Cowdrie's case.*

And certain it is (he saith in another place) that this kingdom hath been best governed, and peace and quiet preserved, when both parties, that is, when the justices of the temporal courts, and the ecclesiastical judges, have kept themselves within their proper jurisdiction, without encroaching or usurping one upon another; and where such encroachments or usurpations have been made, they have been the seeds of great trouble and inconvenience. *4 Inst. 321.*

And in the preamble of the statute of the 25 Hen. 8. c. 21. it is recited, that *this realm, recognizing no superior under God but only the king, hath been and is free from subjection to any man's laws, but only to such as have been devised made and obtained within this realm, for the weal of the same, or to such other, as by sufferance of the king and his progenitors the people of this realm have taken at their liberty by their own consent to be used amongst them, and have bound themselves by long use and custom to the observance of the same, not as to the observance of the laws of any foreign prince potentate or prelate, but as to the custom and ancient laws of this realm, originally established as laws of the same, by the said sufferance consents and custom and name otherwise.*

And according hereunto lord Hale saith, that neither the canon nor the civil law have any obligation as laws within this realm, upon any account that the popes or emperors made those laws canons rescripts or determinations, or because Justinian compiled their body of the civil law, and by his edicts confirmed and published the same as authentic, or because this or that council or pope made those or these canons or decrees, or because Gratian or Gregory or Boniface or Clement did (as much as in them lay) authenticate this or that body of canons or constitutions; for the king of England doth not recognize any for authority as superior or equal to him in this kingdom, neither do any laws of the pope or emperor, as they are such, bind here; but all the strength that either the papal or imperial

perial laws have obtained in this kingdom, is only because they have been received and admitted either by the consent of parliament, and so are part of the statute laws of the kingdom, or else by immemorial usage and custom in some particular cases and courts, and no otherwise; and therefore so far as such laws are received and allowed of here, so far they obtain and no farther; and the authority and force they have here is not founded on, or derived from themselves, for so they bind no more with us, than our laws bind in Rome or Italy. But their authority is founded merely on their being admitted and received by us, which alone gives them their authoritative essence and qualifies their obligation. *Hale's Hist. of the Com. L.* 27.

And hence it is, that even in those courts where the use of those laws is indulged, according to that reception which hath been allowed: if they exceed the bounds of that reception by extending themselves to other matters than hath been allowed to them, or if those courts proceed according to that law when it is controlled by the common law of the kingdom, the common law doth and may prohibit and punish them. And it will not be a sufficient answer for them, to tell the king's courts, that Justinian or pope Gregory have decreed otherwise. For we are not bound by their decrees further, or otherwise, than as the kingdom here hath as it were transposed the same into the common and municipal laws of the realm, either by admission of, or by enacting the same, which is that alone which can make them of any force in England. *ib.* 28.

But notwithstanding all this, it is well known, that this nation under the Romans was governed wholly by the civil law for the space of upwards of three hundred years; and this, long before the Norman, Danish, or Saxon revolutions. So that perhaps it may as justly be observed, that some parts of the civil law which are still in use within this realm, are the remains of the ancient Roman law never from hence entirely abolished, as that other parts of it have been admitted (or rather re-admitted) from time to time by the princes of this realm, as the study of the civil law prevailed, or as the equity and justice of that law in certain cases merited the adoption of the legislature.

7. Every *bishop*, by his election and confirmation, even before consecration, hath ecclesiastical jurisdiction annexed to his office, as *judex ordinarius* within his diocese; and divers abbots anciently, and most archdeacons at this day, by usage, have had the like jurisdiction, within certain limits and precincts. *Hale's Hist. of the Com. L.* 30.

Appointment of officers in the ecclesiastical courts.

By

By a constitution of archbishop *Chicheley* it is enjoined as follows; To remove the scandals brought upon the authority of the church; we, following the footsteps of the holy canons, do decree, that no *clerk married*, nor *bigamus*, nor *layman*, shall upon any pretence, in his own name or in the name of any other, exercise any spiritual jurisdiction; nor in causes of correction, where the proceedings are for the health of the soul, or where the judge proceedeth *ex officio*, shall in any wise be a scribe or register or keeper of the registry of such corrections: And if any ordinary inferior to the bishop or other person having ecclesiastical jurisdiction; shall admit or suffer any such person to exercise any such office as aforesaid, he shall be *ipso facto* suspended from the exercise of his office and jurisdiction and from the entrance of the church; and all citations, processes, sentences, acts and other proceedings had or made by such clerks married, bigami, or laymen, shall *ipso facto* incur the sentence of the greater excommunication. *Lind. 128.*

But by the statute of the 37 H. 8. c. 17. it is thus enacted: *In most humble wise shew unto your highness, your most faithful humble and obedient subjects the lords spiritual and temporal and the commons of this present parliament assembled, that where your most royal majesty is and hath always justly been by the word of God supreme head in earth of the church of England, and hath full power and authority to correct punish and repress all manner of heresies errors vices sins abuses idolatries hypocrisies and superstitions sprung and growing within the same, and to exercise all other manner of jurisdictions commonly called ecclesiastical jurisdiction; nevertheless the bishop of Rome and his adherents, minding utterly as much as in him lay to abolish obscure and delete such power given by God to the princes of the earth, whereby they might gather and get to themselves the government and rule of the world, have in their councils and synods provincial made divers ordinances and constitutions, that no lay or married man should exercise any jurisdiction ecclesiastical, nor shall be any judge or register in any court commonly called ecclesiastical court, lest their false and usurped power which they pretended and went about to have in Christ's church should decay, wax vile, and of no reputation, as by the said councils and constitutions provincial appeareth, which standing and remaining in their effect, not abolished by your grace's laws, did sound to appear to make greatly for the said usurped power of the said bishop of Rome, and to be directly repugnant to your majesty as supreme head of the church and prerogative royal, your grace being a layman; and albeit the said ordinances and constitutions by a statute made in the five and twentieth*

twentieth year of your most noble reign be utterly abolished frustrate and of none effect, yet because the contrary is not used nor put in practice by the archbishops bishops archdeacons and other ecclesiastical persons, who have no manner of jurisdiction ecclesiastical but by and from your royal majesty, it addeth or at least may give occasion to some evil disposed persons to think the proceedings and censures ecclesiastical made by your highness and your vicegerent officials commissaries judges and visitators, being also lay and married men, to be of little or no effect; but forasmuch as your majesty is the only and undoubted supreme head of the church of England, to whom by holy scripture all authority and power is wholly given to bear and determine all manner of causas ecclesiastical, and to correct vice and sin whatsoever, and to all such persons as your majesty shall appoint thereunto: In consideration thereof, as well for the instructions of ignorant persons as also to avoid the occasion of the opinion aforesaid, and the setting forth of your prerogative royal and supremacy, it may therefore please your highness that it may be ordained and enacted by authority of this present parliament, that all and singular persons, as well lay as married, being doctors of the civil law lawfully create and made in any university, who shall be appointed to the office of chancellor, vicar general, commissary, official, scribe, or register, may lawfully execute and exercise all manner of jurisdiction commonly called ecclesiastical jurisdiction, and all censures and coercions appertaining or in any wise belonging to the same, albeit such person or persons be lay, married, or unmarried, so that they be doctors of the civil law as is aforesaid; any law, constitution, or ordinance to the contrary notwithstanding.

In the case of *Walker and Sir John Lamb, T. 8 Charl.* One question was, whether the patent of the office of commissary to the plaintiff, who was a lay person, and not a doctor but a batchelor only of the civil law, was good, or was restrained by this statute. And as to that point, all the court conceived, the grant was good; for the statute doth not restrain any such grant; and it is but an affirmance of the common law, where it was doubted if a lay or married person might have such offices; and to avoid such doubts, this statute was made, which explains, that such grants were good enough; and it is but an affirmative statute, and there is no restriction therein: And altho' doctors of the law (tho' lay persons or married) shall have such offices, yet that is not any restriction that none others shall have them but doctors of the law; and the statute mentions as well registers and scribes as commissaries, and that a doctor of the law shall have those offices, yet in common experience such persons as are merely

merely lay and not doctors have exercised such offices. Wherefore they resolved that the grant was well enough. *Trin. Car. 258.*

By *Can. 127.* No man shall be admitted a chancellor, commissary, or official to exercise any ecclesiastical jurisdiction, except he be of the full age of six and twenty years at the least, and one that is learned in the civil and ecclesiastical laws, and is at the least a master of arts, or bachelor of law, and is reasonably well practised in the course thereof, as likewise well affected and zealously bent to religion, touching whose life and manners no evil example is had; and except before he enter into or execute any such office, he shall take the oath of the king's supremacy in the presence of the bishop, or in the open court, and shall subscribe to the thirty nine articles, and shall also swear that he will to the uttermost of his understanding deal uprightly and justly in his office, without respect of favour or reward; the said oaths and subscription to be recorded by a register then present.

By the ancient canon law, no person was to be a proctor unless he were seventeen years of age; nor judge unless he were of the age of twenty five. *Gibf. 987.*

And by *Can 128.* No chancellor, commissary, archdeacon, official, or any other person using ecclesiastical jurisdiction, shall substitute, in their absence, any to keep court for them, except he be either a grave minister and a graduate, or a licensed publick preacher, and a beneficed man near the place where the courts are kept, or a bachelor of law, or a master of arts at least, who hath some skill in the civil and ecclesiastical law, and is a favourer of true religion, and a man of modest and honest conversation; under pain of suspension, for every time that they offend therein, from the execution of their offices for the space of three months toties quoties: and he likewise that is deputed, being not qualified as is before expressed, and yet shall presume to be a substitute to any judge, and shall keep any court as aforesaid, shall undergo the same censure in manner and form as is before expressed.

By the 5 & 6 Ed. 6. c. 16. *If any person shall bargain or sell any office or deputation of any office or any part thereof; or take any reward, promise, covenant, bond, or other assurance to receive any profit, directly or indirectly, for the same, or to the intent that any person should have or enjoy the same; which said office shall in any wise concern the administration or execution of justice; he shall forfeit all his interest therein, and right of nomination thereunto; and he who shall give or pay or make such promise or agreement as aforesaid, shall be disabled in the law to have and enjoy the same; and such bargain shall be void.*

void. But acts done by such officer so offending, before he be removed, shall be good in law.

Any office] In *Dr. Trevor's case*, *H. 8 Jac.* It was resolved by the opinion of the justices, upon a reference unto them by the lord chancellor, that the office of chancellor, register, and commissary in the ecclesiastical courts, are within this statute. Which statute being made for avoiding of corruption in officers, and for the advancement of persons more worthy and sufficient to execute the said offices by which justice and right shall be advanced, shall be expounded most beneficially to suppress corruption. And inasmuch as the law allows ecclesiastical courts to proceed in the case of blasphemy, heresy, schism, incontinence, matrimony, divorce, right of tithes, probate of wills, granting of administrations, and such like; and that from these proceedings dependeth not only the salvation of souls, but also the legitimation of issues, and the like; and that no debt or duty can be recovered by executors or administrators, without the probate of testaments, or letters of administration, and other things of great consequence: it is more reason that such officers, which concern the administration and execution of justice in these points, that concern the salvation of souls, and other matters aforesaid, shall be within this statute, than officers which concern the administration or execution of justice in temporal matters only. *12 Co. 78. Cro. Jac. 279.*

Or deputation of any office] In the case of *Culliford and Cardenell*, *H. 8 W.* the defendant was made deputy to the plaintiff in his office, and gave bond to pay the plaintiff half the profits. On putting the bond in suit, the defendant pleaded this statute. But the determination of the court was, that such bond is not within the statute, because the condition is not to pay him so much in gross, but half the profits, which profits must be sued for in the principal's name; for they belong to him, tho' out of them a share is to be allowed to the deputy for his service. But in the case of *Gadolphin and Tudor*, *M. 3 An.* where the deputy was to have the fees, and in consideration thereof was to pay 200*l.* a year, and save the principal harmless, this was declared to be within the statute. And it was held by the court, that where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a lesser sum out of the salary, it is good; so if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a sum certain out of the fees and profits of the office, it is good: for in these cases, the deputy is not to pay, unless the profits rise to so much.

And tho' a deputy, by his constitution, is in place of his principal, yet he has no right to the fees; they still continue to be the principal's; so that, as to him, it is only reserving a part of his own, and giving away the rest to another. But where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and such bond is void by the statute. *Gibf.* 980. 2 *Salk.* 466. 468.

The doctrine which we find in *Lindwood* upon this head is, If a person having spiritual jurisdiction assign to another for his salary a certain sum, so that he answer to his principal for the whole profits, this is lawful; but if the other be to retain the whole profits to himself, and answer to his principal a certain sum, this is unlawful. *Lind.* 282.

He shall forfeit all his interest therein] In the case of *Sir Arthur Ingram, M.* 13 *Ja.* it was resolved by the lord chancellor Egerton and Coke chief justice, to whom the king had referred it, upon conference with the other justices, that the disability here intended is such, that the person is utterly disabled during life to take the same office; altho' that afterwards becomes void by the death of any other, and a new grant be made unto him. 3 *Inst.* 154.

And right of nomination thereunto] The statute not having said, who shall dispose of the office, upon such forfeiture and disability; that point came under consideration in the case of *Woodward and Fox, T.* 2 *W.* and two things were resolved, 1. That the right of disposing of the office so forfeited (which in that case was the registership of the archdeacons of Huntingdon) did devolve to the crown. 2. That the king might make a new register, before office found, or the appearing of the title by any matter of record. *Gibf.* 981. 2 *Ventr.* 188. 267.

By the 1 *Eliz.* c. 19. *All gifts grants or other estates, to be made by any archbishop, or bishop, of any hereditaments belonging to his archbishoprick or bishoprick, other than for the term of twenty-one years or three lives, and whereupon the old accustomed yearly rent or more shall be reserved and payable yearly during the said term, shall be void.*

And by the 13 *Eliz.* c. 10. *All gifts grants or other estates to be made by any dean and chapter of any cathedral or collegiate church, or other having any spiritual or ecclesiastical living, of any hereditaments belonging to such cathedral church or other spiritual promotion other than for the term of one and twenty years or three lives, and whereupon the accustomed yearly rent or more shall be reserved and payable during the said term, shall be utterly void and of none effect.*

And

And it hath been adjudged, that the offices of chancellor, commissary, official, register, and such like, are hereditaments within these statutes. The general design of which being to preserve the rights of successors, against any illegal practices of the present possessors; it hath been, ever since, the general rule in the courts of common law, that no offices of any kind are grantable by bishops or other ecclesiastical persons, as such, in any larger extent, than they shall appear to have been granted before these statutes. *Gibf. 982. (e)*

More especially, it hath been declared, as a maxim there, that grants of offices being made for more lives than they had been made for before these statutes, or being made in reversion, where before these statutes they had not been made in reversion, are both void. *Gibf. 982.*

But where the question is, whether this or that office hath been granted, for two or three lives, or in reversion, before the statutes; proof hath been allowed of the practice of such grants for many years past, tho' not reaching quite to the times of these statutes, where no evidence appeareth to the contrary of grants made before the said statutes. *Gibf. 982. (f)*

In the case of *Jones and Pugh, M. 3 W.* the bishop of Landaff had granted the office of vicar general to two persons, to hold jointly and severally, to be exercised by themselves or their sufficient deputy. It appeared, and was made part of the cause by the counsel on both sides, that this office had been anciently and usually granted to two, jointly and severally, and to the survivor of them. But it was objected, that a judicial office could not be granted to two; for if they differ, nothing can be done. But the answer was, that the same may be said of four judges, as in the court of king's bench: and in ministerial offices, as two sheriffs. And the court held the grant good, and said, if an office be granted to two, and one dies, the office doth not survive, but determines; as if there be two sheriffs, and one dies, the other cannot act; otherwise if granted to two, and the survivor of them. *Gibf. 983. 2 Salk. 465. Carth. 213.*

8 *Can. 125.* All chancellors, commissaries, archdeacons, officials, and all others exercising ecclesiastical jurisdiction, shall appoint such meet places for the keeping of their courts by the assignment or approbation of the bishop of the diocese, as shall be convenient for entertainment Courts where to be kept.

(e) *Cro. Car. 258. W. Jones, 263. 10 Rep. 60.*

(f) 4 *Med. 17, 18.*

of those that are to make their appearance there, and most indifferent for their travel: and likewise they shall keep and end their courts in such convenient times, as every man may return homewards in as due season as may be.

Approbation of the bishop] And this is agreeable to the rule of the ancient canon law. *Gibf.* 1001.

In the case of the bishop of *St. David's*, *E. 11 W.* it was alledged against the proceedings of the archbishop, that he was cited to Lambeth before the archbishop himself, and not to the court of arches: upon which it was declared by the court of king's bench, that the archbishop may hold his court where he pleases, and may convene before himself, and sit judge himself; and so may any other bishop; for the power of a chancellor or vicar general is only delegated in case of the bishop. *1 Salt.* 134.

Manner of proceeding in the ecclesiastical courts.

9. The ecclesiastical courts do proceed according to the rules of the civil and canon law: the suit is commenced by libel; the witnesses are privately examined; then there are exceptions and replications: the sentence is published in writing; and from the sentence there lies an appeal, from the bishop to the archbishop; from the archdeacon to the bishop or immediately to the archbishop; from the archbishop, as heretofore to the pope, so now to the king in chancery, where delegates are appointed, who judge according to the civil and canon law, and revoke or confirm the sentence: and in these judgments given by the course of the civil law, the judges of the common-law do acquiesce, and give credit thereunto, and will not examine them over again unless they think that there is cause for the king's prohibition. *Duck.* 346.

Seal.

10. *Ordo.* We do ordain, that archbishops, bishops and their officials, abbots, priors, deans, archdeacons and their officials, and deans rural, as also chancellors of cathedral churches, and all other colleges whatsoever, and convents either jointly with their rector or severally (according to their custom or statutes) shall have a seal, on which seal shall be engraved their several distinctions; as the name of their dignity, office or college; also their proper name (if it be an office perpetual); and so it shall be esteemed an authentic seal: but if the office is not perpetual, as that of rural deans and officials, then the seal shall have engraved upon it only the name of office; and at the expiration of their office, they shall immediately and without difficulty resign it to those from whom they received the office. *Athol.* 67.

Can. 124. No chancellor, commissary, archdeacon, official, or any other exercising ecclesiastical jurisdiction, shall without

Without the bishop's consent have any more seals than one, for the sealing of all matters incident to his office : which seal shall always be kept either by himself, or by his lawful substitute exercising jurisdiction for him, and remaining within the jurisdiction of the said judge, or in the city or principal town of the county. This seal shall contain the title of that jurisdiction which every of the said judges or their deputies do execute.

11. Where some temporal matter depends on an eccle- ^{Trial of tempo-}
 siastical cause, and is necessary to be determined with it, ^{ral incidents.}
 there, tho' the ecclesiastical judges may try such temporal
 matter, yet they ought to do it by the rules of the common
 law to which it properly belongeth : otherwise the common
 law judges will interpose, by sending prohibitions. *1 Pierre*
Will. 12. Str. 672.

As, in case of the stoppage of a way for the carrying
 of tithes ; tho' the spiritual court may try whether the way
 was stopped or not, yet stoppage of ways being matter
 properly triable at the common law, and only allowed to
 the spiritual court in this case to be tried as a thing depend-
 ing upon and necessary to the parson's having and carrying
 away his tithes, they ought to proceed in the trial thereof,
 according to the rules of the common law, and to allow
 such proofs as by that law are allowable : otherwise they
 will be prohibited. *Watf. c. 54. (g)*

12. In many cases, the common law and ecclesiastical ^{Concurrent ju-}
 courts have a concurrent jurisdiction. Accordingly, in the ^{isdiction.}
 statute of *articuli cleri*, 9 Ed. 2. c. 6. where the clergy do
 alledge, that if any cause or matter, the knowledge whereof
 belongeth to a court spiritual, shall be definitively determined
 before a spiritual judge, and doth pass into a judgment, and
 shall not be suspended by an appeal ; and after, if upon the
 same thing a question is moved before a temporal judge between
 the same parties, and it be proved by witness or instruments ;
 such an exception is not to be admitted in a temporal court : It
 is answered by the king and parliament, That when any
 one case is debated before judges spiritual and temporal, as in
 the case of laying violent hands upon a clerk, it is thought, that
 notwithstanding the spiritual judgment, the king's court shall

(g) Where the spiritual court hath jurisdiction of the prin-
 cipal cause, they determine the accessory, but in doing this
 they must proceed according to the rules of the common law,
 and therefore cannot require two witnesses. *12 R.p. 65.*
Robert's Case, Hob. 188. 247.

discuss the same matter as the party shall think expedient for himself

For the spiritual judges proceedings are for the correction of the spiritual inner man, and for the health of the soul, to enjoin him penance; and the judges of the common law proceed to give damages and recompence for the wrong and injury done. As where one layeth violent hands upon a clerk, the spiritual judge *pro salute anime* shall injoin him penance, and the clerk may have his action of battery, and recover damages for the injury done to him; and so in like cases. And therefore this article of the clergy was rejected. 2 *Inst.* 622.

Offences capital. 13. A person admitted to the benefit of clergy, is not to be deprived in the spiritual court, for the crime for which he hath had his clergy. For a pardon frees the party from all subsequent punishment, and consequently from deprivation. Yet Dr. Watson holds an opinion, *Watf. c. 6.* [which hath also been adopted by others] on the authority of *Gre. Ja. 430.* in *Searle's case*, that a clergyman may be deprived for manslaughter after he hath had his clergy; not observing, that what is said there, was only on the sudden, on a motion for a prohibition in the king's bench; and that in the same case a prohibition was afterwards actually brought and declared on in the court of common pleas, and judgment thereupon solemnly given for the plaintiff upon open argument by all the judges. 2 *Haw. 364. (b)*

For there is not any maxim in the law better established, than that the ecclesiastical court hath no cognizance or jurisdiction in cases of treason or felony. *Exam. of the scheme of cha. pow. 90.*

Temporal courts to give credence to sentence given in the ecclesiastical court. 14. When the spiritual court hath given sentence of deprivation in cases within their cognizance (as in the case of simony, for instance); the temporal court ought to give credence thereunto, and ought not to dispute whether it be error or not. For the temporal court cannot take cognizance of their proceedings herein, whether they be lawful or not; which is the reason, that in the temporal court it sufficeth to plead a sentence out of the spiritual court briefly, without shewing the manner thereof, and of their proceedings. *Watf. c. 5. (i)*

(b) *Hob. 288.*

(i) *Gre. Elix. 686. 789.*

15. No damages can be recovered in the ecclesiastical court; but costs only. *Watf. c. 30. (k)* Execution of the sentence.

And the coercion or execution of the sentence, is only by excommunication of the person contumacious, and upon signification thereof into chancery, a writ *de excommunicato capiendo* issues, whereby the party is imprisoned till obedience yielded to the sentence. But besides this coercion, the sentences of the ecclesiastical courts touching some matters do introduce a real effect, without any other execution; as a divorce a *vinculo matrimonii* for consanguinity or frigidity, doth induce a legal dissolution of the marriage; so a sentence of deprivation from an ecclesiastical benefice, doth by virtue of the very sentence, without any other coercion or execution, introduce a full determination of the interest of the person deprived. *Hale's Hist. of the Com. L. 33.*

16. Upon the whole, lord chief justice Hale, speaking of the ecclesiastical jurisdiction, expresseth himself thus: Albeit in these courts and matters, the laws of England (upon the reasons and account before expressed) have admitted the use and rule of the canon and civil law, yet still the common law retaineth the superiority and pre-eminence. And the substance of all that hath been said upon this point is this: General superintendency of the common law.

First, that the jurisdiction exercised in the ecclesiastical court is derived from the crown of England, and that the last devolution is to the king by way of appeal.

Secondly, that altho' the canon or civil law be allowed as the direction or rule of their proceedings; yet that is not as if either of those laws had any original obligation in England, either as they are the laws of emperors, popes, or general councils, but only by virtue of their admission here; which is evident, for that those canons or imperial constitutions which have not been received here do not bind; and also, for that by several contrary customs and usages in this realm, many of those civil and canon laws are restrained and controlled.

Thirdly, that albeit those laws are admitted in some cases in the ecclesiastical courts, yet they are but *leges sub graviore lege*; and the common laws of this kingdom have ever obtained and retained the superintendency over them, and those *signa superioritatis* before mentioned, for the

(k) If the party injured require damages, he must proceed at common law. *Watf. lb.*

honour of the king and the common laws of England. For as the laws and statutes of the realm have prescribed to the ecclesiastical courts their bounds and limits, so the courts of common law have the superintendency over them to keep them within the limits of their jurisdiction, and to judge and determine whether they have exceeded those limits or not; and in case they do exceed their bounds, the courts of common law will issue their prohibitions to restrain them, directed either to the judge, or party, or both. And also in case they exceed their jurisdictions, the officer that executes the sentence, and in some cases the judge that gives it, are punishable in the courts of common law; sometimes at the suit of the king, sometimes at the suit of the party, and sometimes at the suit of both, according to the variety and circumstances of the case.

Lastly, that the common law, and the judges of the courts of common law, have the exposition of such statutes or acts of parliaments, as concern either the extent of the jurisdiction of those courts, or the matters depending before them. And therefore if those courts either refuse to allow these acts of parliament, or expound them in any other sense than is truly and properly the exposition of them; the king's great courts of the common law (who next under the king and his parliament have the exposition of those laws) may prohibit and controul them. *Hale's Hist. Com. L.* 41. 1 *Hale's Hist. Pl. Cr.* 408.

After all, it is humbly submitted, whether there doth not appear to be some kind of prejudice, even in this great and good man, whenever he touches upon the ecclesiastical jurisdiction. And the like may be observed of two other very great men, who (in like manner as lord Hale) sustained the office of lord chief justice of England, in their respective ages, with integrity, learning, and spirit; namely, the lord chief justice Coke, and the lord chief justice Holt. The truth is, this seeming bias in them all was owing in a great measure, to the spirit of the times in which they were respectively educated; wherein the contests between the two jurisdictions were violent, and carried on with obstinacy on both sides. It is the glory of the present age, that these ferments have at length subsided. Learned men can now differ in opinion, without bitterness and mutual reproaches; and the several discordant parties have been instructed to live together in a mutual intercourse and communication of good offices. Persecution hath departed to its native hell; and fair benevolence hath

hath come down from heaven. The distinctions which were introduced during the plenitude of papal power have fallen away by degrees; and we shall naturally recur to the state wherein popery took us up, in which there was no thwarting between the two jurisdictions, but they were amicably conjoined, affording mutual help and ornament to each other*.

Courts in the church or church yard. See Church.

* It may not be amiss to take notice in this place, amongst other means of producing the abovesaid desirable effect of the institution by the late Mr. Viner of a professorship of the common law within one of our universities; which naturally will conduce to promote a more intimate connection between the students of the ecclesiastical and temporal laws, and (as Sir William Blackstone expresseth it) "by extending the perambula
" of university learning, and adopting (as it were) a new
" tribe of citizens within their philosophical walls, will interest
" a very numerous and very powerful profession in the pres-
" ervation of their rights and liberties †."

And here one cannot refrain from congratulating that learned body, on the choice of their professor at the first setting forward of this establishment; in whom are united qualities which seldom concur in one person, such as, application and genius, solidity and vivacity, attention to dates and figures, and a consummate elegance of composition; who can enliven the relics of antiquity, and render the driest subjects of the law not only useful but entertaining.

Mr. Viner dedicated his whole life to the service of the public, in compiling a digest of the common law; which, after the labour of above half a century, he had the happiness to live to publish, in two and twenty volumes in folio; and hath provided, out of the profits of his benefaction to the university, that the same shall be continued from time to time, as occasion shall require, at proper intervals. For the effectual performance whereof, it may be requisite, and will best answer Mr. Viner's benevolent intention, not barely to insert under their proper titles such cases as shall happen to be adjudged in time to come, but deliberately to re-examine such whole titles respectively. It is astonishing, that one man could perform what Mr. Viner hath done; but it would be much more astonishing, if such work should at once be perfectly finished in all its parts; and it is not to be supposed, but that a number of men, attending respectively to detached branches, would render the performance more complete. This is a task

† Introductory lecture, page 27.

Curates.

SO far as any churches or chapels which fall under this title are donative, and to be considered as such; is treated of under the title *Donative*.

Curate is a word of ambiguous signification; sometimes, and most properly, it denoteth the incumbent in general who hath the cure of souls; but more frequently it is understood to signify a clerk not instituted to the cure of souls, but exercising the spiritual office in a parish under the rector or vicar: and in this latter sense it is treated of in this place.

Of such curates there are two kinds: first, temporary, who are employed under the spiritual rector or vicar, either as assistant to him in the same church, or executing the office in his absence in his parish church, or else in a chapel of ease within the same parish belonging to the mother church; the other, by way of distinction called perpetual, which is, where there is in a parish neither spiritual rector nor vicar, but a clerk is employed to officiate there by the impropriator.

There are many things common to these several kinds of curates, and other things peculiar to each; as will appear in the following sections.

which Mr. Viner seemeth to have reserved for future proficients under his own institution. In order to render the book so sufficient, as to supercede the necessity of having recourse to the originals from whence it is extracted; it seemeth even yet to be too short: If considered only as an index, directed to the original for further satisfaction; it needeth not to be so long. And perhaps a work of a less discouraging size, extracted from the whole, might be of more general use to all but professed lawyers. And this seemeth to have been at first Mr. Viner's design; intending only a republication of Roll's abridgment, together with the cases since adjudged, which multiplied upon him more than in theory could have been imagined. And this hath been an accidental hindrance to the perfection of Mr. Viner's work: By adhering scrupulously to Roll's general titles and respective subdivisions, the book is rendered less intelligible, than if upon a general prospect of the materials the author had pursued that method, which his own judgment and the natural order of things would have suggested. And the inconvenience is the greater, in that as yet there is wanting a general index to the whole.

1. When

1. When by long use and custom parochial bounds became fixed and settled, many of the parishes where still so large, that some of the remote hamlets found it very inconvenient to be at so great a distance from the church; and therefore for the relief and ease of such inhabitants, a method obtained of building private chapels or oratories, in which a capellane was sometimes endowed by the lord of the manor, or some other benefactor, but generally maintained by a stipend from the parish priest. *Ken. Par. Ant.* 587. Origin of curates in chapels of ease.

• But in order to authorize the erecting of a chapel of ease, the joint consent of the diocesan, the patron, and the incumbent (if the church was full) were all required. *Ken. Par. Ant.* 585. (1)

2. The origin of perpetual curacies was thus: By the statute of the 4 H. 4. c. 12. it is enacted, that in every church appropriated there shall be a secular person ordained vicar perpetual, canonically instituted and inducted, and covenantly endowed by the discretion of the ordinary. Origin of perpetual curacies.

But if the benefice was given *ad mensam monachorum*, and so not appropriated in the common form, but granted by way of union *pleno jure*; in that case it was served by a temporary curate belonging to their own house, and sent out as occasion required. The like liberty, of not appointing a perpetual vicar, was sometimes granted by dispensation, in benefices not annexed to their tables, in consideration of the poverty of the house, or the nearness of the church. But when such appropriations, together with the charge of providing for the cure, were transferred (after the dissolution of the religious houses) from spiritual societies to single lay persons, who were not capable of serving them by themselves, and who by consequence were obliged to nominate some particular person to the ordinary for his licence to serve the cure; the curates by this means became so far perpetual, as not to be wholly at the pleasure of the appropriator, nor removable but by due revocation of the licence of the ordinary. *Gibb.* 819. (m)

3. The appointment of a curate to officiate under an Appointment of incumbent in his own church, must be by such incumbent's nomination of him to the bishop, in this or the like form:

(1) See Chapel, 4, 5.

(m) See Appropriation, II.

Curates.

“ To the right reverend father in God Charles lord
 “ bishop of Cashile. These are to certify your lordship,
 “ that I *A. B.* rector, [or, vicar] of ——— in the county
 “ of ——— and in your lordship's diocese of ———,
 “ do hereby nominate and appoint *C. D.* to perform the
 “ office of a curate in my church of ——— aforesaid;
 “ and do promise to allow him the yearly sum of ———
 “ for his maintenance in the same; humbly beseeching
 “ your lordship to grant him your licence to serve the said
 “ cure. In witness whereof I have hereunto set my hand
 “ and seal, the ——— day of ———, in the year of our
 “ Lord ———.”

The appointment also of a curate in a chapel of ease seemeth most properly to belong to the incumbent of the mother church, who is instituted to the cure of souls throughout the whole parish: and who therefore in such case may himself serve in the chapel, as well as his curate or chaplain (*) (unless it be in the case of augmentation by the governors of queen Anne's bounty, as will appear afterwards).

But by agreement (of the bishop, patron, and incumbent) the inhabitants may have a right to elect and nominate a curate. Otherwise, the ancient custom was, that he was either arbitrarily appointed by the vicar; or by him nominated to the rector and convent, whose approbation did admit him; or was nominated by the inhabitants (as founders and patrons) to the vicar, and by him presented to the ordinary; for custom herein was different: sometimes a curate was to be presented by the patron of the church to the vicar, and by him to the archdeacon, who was then obliged to admit him; at other times the lord of the manor did present a fit person to the appropriators, who without delay were to give admission to the person so presented. *Ken. Par. Ant.* 589.

In the case of *Herbert* and others against the dean and chapter of *Westminster* and *Dr. Broderick*, *H.* 1721. Upon the plague which happened in the year 1625, the churchyard of *St. Margaret's Westminster* not being large enough to bury the dead parishioners, the inhabitants of that part of that parish, which now resorts to the new chapel built there, petitioned the dean and chapter of *Westminster* (who were lords of the manor) to grant them a waste

(*) *Hob.* 67.

piece of ground to bury their dead, which accordingly the dean and chapter did under their seals; and it was solemnly consecrated. Afterwards these inhabitants were at the charge of building a chapel there, having first obtained a royal licence for that purpose. The vestrymen and chapelwardens had ever since the year 1653 elected the ministers who were to preach there; but now the dean and chapter of Westminster claimed a right to name the minister who should preach and do divine service in this chapel. On a bill brought to settle the right of nominating the parson of this chapel: By Macclesfield lord chancellor; When the dean and chapter gave this ground, they did not reserve any power to nominate the preacher; and the inhabitants of the chapelry were at the expence of building the chapel. Now the building and endowing of the church was what at the common law originally entitled the patron to the patronage. Here the inhabitants built the chapel, and (as appears) by the pew money have endowed it. It is not reasonable to say that the dean and chapter, as parson appropriate, have a right to supply every chapel built within the parish with a preacher. It would be an expence and hardship upon them to be obliged so to do: neither ought it to be at their election to supply it. For suppose I build a chapel in my house for myself or my next neighbour, can the parson name one to preach there? I think not. And it will make no alteration, if the chapel which I build in my own ground be intended for the use of twenty neighbours besides my own family.— But afterwards, on the hearing, the court decreed, that the right of nomination of the minister did belong to the dean and chapter. 1 P. Will. 773. (c)

The

(c) *Per Ld. Northington Cb.* Whenever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless there is a special agreement to the contrary which gives a compensation to the incumbent of the mother church, or a prescription in which every thing is presumed to have been proper. *Dixon v. Kershaw and others*, Amb. 528. And in that case, though the chapel was erected and endowed by a grant of lands from the lord and freeholders of a manor, and though the right of nomination was given by the archbishop in the deed of consecration to the inhabitants, and the vicar of the mother church at the time declared he had no right to nominate, and though the inhabitants had repaired and nominated for 90 years, his lordship decreed

The form of a nomination to a chapel of ease (as also to a perpetual curacy) may be to this effect: "To the right reverend father in God ——— lord bishop of ———
 " A. B. of ——— &c. sendeth greeting. Whereas the
 " curacy of ——— in the county of ——— and diocese of
 " ——— is now void by the death of C. D. last incum-
 " bent there, and doth of right belong to my nomination:
 " These are humbly to certify your lordship, that I do
 " nominate E. F. clerk to the curacy aforesaid; request-
 " ing your lordship to grant him your licence for serving
 " the said cure. In witness whereof I have hereunto set
 " my hand and seal, the ——— day of ——— in the
 " year of our Lord ———."

It is not necessary in order to prevent a lapse, that the appointment be within six months: for if the patron of a curacy do not nominate a clerk, there can be no lapse thereof (except in the case of having received the augmentation, as will appear afterwards); but the bishop may compel him to do it by spiritual censures. 1. *Inst.* 344. *Gibb.* 819.

This was declared to be law, in the case of *Fairchild* and *Gayre*, with regard to donatives (p); because though the church is exempted from the power of the ordinary, yet the patron is not: and it holds much more strongly in the case of curacies, where both church and patron are subject to the ordinary's jurisdiction, and where therefore he may likewise sequester the profits, and appoint another to take care of the cure, till the patron shall nominate a fit and proper clerk. *Gibb.* 819.

Whether a man-
damus will lie,
to admit or re-
store a curate.

4. The following case was moved as of a donative, but it seems clearly to have been only a chapel of ease under the mother church, both from the vicar and also the inhabitants claiming the right of nomination, and especially from the bishop's licence being obtained (which is contrary to the nature of a donative). But it was moved as of a donative probably because the case of a donative in that particular is somewhat stronger than that of a mere chapel of ease. It was thus: *T.* 33 *G.* 2. *K.* and *Bloer*. A man-

creed the right of nomination to belong to the vicar, as there was no agreement *by deed* between the bishop, patron, and incumbent, nor evidence of a prescriptive title in the inhabitants.

(p) *Cro. Ja.* 63.

damus

damus was moved for to be directed to one Samuel Blooper, a parishioner of Matfield in Staffordshire, and an inhabitant of the chapelry of Calton within that parish, (who had turned Mr. William Langley the curate of that chapel out of it after he had been eleven weeks in possession, and locked it up,) commanding him to restore the said William Langley, clerk, to the place and office of curate of the said chapel. It appeared that this chapel is endowed with lands; and that the inhabitants of four different parishes contribute to the repair of it. The curate of it has a stipend. Mr. Evans, the vicar of Matfield, swore in his affidavit, that he believes he has the right of nomination to it, and that it has been executed, and that Mr. Langley is appointed and nominated by him. But there were contrary affidavits, wherein the deponents swear, that they believe the right of nomination to be in the inhabitants. It appeared that Mr. Langley had a licence. On shewing cause against issuing the mandamus, it was urged, that this chapel is a donative; and as the particular nature of it was not stated, it must be considered as only a private chapel, and not as a public office; and consequently no mandamus will lie. Besides, the right of nomination is not established. The vicar only swears, that he believes he has the right of nomination; which is contradicted by the adverse affidavits. And if it were not, yet a vicar has nothing to do with a donative. The case was mentioned of Prescot, chaplain of Manchester college, reported in 2 *Strange* 797. But there were letters patent: the college was of the foundation of the crown; the ground of the court's interposing in that case was, because there was no other remedy. This man may have another remedy: he may bring an ejectment for the farm, which he says belongs to him as curate of this chapel; or he may have his action of trespass. Every vicar might as well come for a mandamus to be restored, as this man. On the other hand, it was argued, that this was an office that concerned the public, and therefore a mandamus would lie to restore to it. A mandamus will lie to restore even a sexton, or a parish clerk. It doth not appear that this is a donative. But if it be, yet no licence is necessary in case of a donative, though in the case of a perpetual curacy it is necessary. And it is no objection to say, that he hath another remedy, if he be intitled to this. The counsel on the other side (against the mandamus) observed, that parish clerks and sextons are temporal officers; whereas this is ecclesiastical: and a vicar or rector

rector may just as well apply for a mandamus, as the chaplain of a donative.——By lord Mansfield chief justice: This is a mere temporal question. Three objections have been offered against making the rule absolute: the first was, That there is no sufficient ground for asking a mandamus. *Ans.* But this chaplain hath shewn an appointment, and a licence; and was in quiet possession for eleven weeks. Second objection: That he has not the right; for the nomination is not in the vicar, but in the inhabitants. *Ans.* We cannot try the merits upon affidavit. He claims a right, though it is litigated; and that is sufficient for the present purpose. Third objection: That even supposing him to have a title, and to have been in possession, and turned out of it; yet he ought not to be assisted by way of mandamus, but be left to his ordinary legal remedy, by ejectment or an action of trespass. *Ans.* A mandamus to restore is the true specific remedy, where a person is wrongfully dispossessed of any office or function which draws after it temporal rights; in all cases where the established course of law hath not provided a specific remedy by another form of proceeding, as it hath provided in the case of rectories and vicarages. Here are lands annexed to this chapel, which belong to the chaplain in respect of his function. If the bishop had refused without cause, to licence him, he might have had a mandamus to compel the ordinary to grant him a licence. He is now turned out of the chapel and every thing belonging thereto, by force. It is said; He may bring an ejectment, or an action of trespass. I am not sure that he could. It doth not appear that the legal property is in him. On the contrary, it is certain that it is not. It might originally be in seoffees. Those seoffees may not have been regularly continued. It may be impossible to find the heir of the survivor. If they have been continued, the present seoffees may refuse to let Mr. Langley make use of their names. Neither of these actions, if he could bring them, would be a specific remedy. In the one, he might recover damages; in the other, he might recover the land: but by neither would he be restored to his pulpit, and quieted in the exercise of his function and office. —And the rule was made absolute for a mandamus. No return was made to it: but the parties agreed to try the merits in a feigned issue.

Note. Upon this case being afterwards mentioned, the court took occasion to say, that they had reconsidered the point, and weighed all the principles and authorities

thorities applicable to it; and were fully satisfied that the properest and most effectual method of trying the right to officiate in such chapels, whether it depended upon nomination or election, was by mandamus. *Burrow, Manf.* 1043. (9)

5. To every of these several kinds of curates, the ordinary's licence is necessary, before he shall be admitted to officiate. Licence

For by *Can.* 48. No curate or minister shall be permitted to serve in any place without examination and admission of the bishop of the diocese, or ordinary of the place having episcopal jurisdiction, under his hand and seal; having respect to the greatness of the cure, and meetness of the party.

(9) The authority of this case has been shaken by subsequent decisions. It was observed by Mr. J. Buller in *the King v. the Bishop of Chester*, that the grounds on which the court of king's bench formerly granted or refused a mandamus, are not explicitly stated; but the court has lately granted this discretionary writ only in cases where there was no other specific legal remedy, or where such remedy (as an *assize*) was obsolete. In the last mentioned case, there was a cross-nomination to a curacy, and one of the nominees applied to the court for a mandamus to the bishop to license him, which the court refused, because he had a specific legal remedy by *quare impedit*. 1 *T. Rep.* 396. This reasoning seems also to have been adopted in a later case of *the King v. the Marquis of Stafford*. The affidavits in that case stated the usage to be, that the minister of the chapel of Willenhall ought to be nominated and appointed by the inhabitants of the town of Willenhall, having lands of inheritance within the town, and being so nominated ought to be presented and allowed by the lord of the manor of Stowe Heath. That on a commission of charitable uses, in the reign of James I. it was agreed between the lord of the manor and the said inhabitants, that certain copyhold lands should be let, through the medium of trustees, for the reparation of the said chapel, and the maintenance of a stipendiary priest or curate, to be nominated by a majority of the said inhabitants, and to be allowed by the lord, and by him presented to the ordinary for a license to preach. The lord having refused to allow and present the nominee of a majority of the inhabitants, the latter prayed a *mandamus*, which the court refused, saying their right was either a mere trust, and then their remedy was in equity, or it was a legal right, in which case a *quare impedit* would lie. 3 *T. Rep.* 646. See *Abbottson*, 14. in the *note*. And *post.* 10.

In

In order to which,

(1) He must produce his nomination in form aforesaid.

(2) Then it must appear in the next place, that he is in holy orders; of deacon at least, if he is to be licensed to be an assistant curate: and of priest, if he is to be licensed to a perpetual curacy; for by the 13 & 14 C. 2. c. 4. s. 14. no person shall be admitted to any *benefice or ecclesiastical promotion* before he shall be ordained priest; and it is the more necessary in this case, because he is the sole incumbent in the parish, and by the same statute until he shall be ordained priest he may not consecrate the sacrament of the Lord's supper. Which words *benefice or promotion* do also extend to all chapels of ease which have received the augmentation of queen Anne's bounty; for by one of the statutes of augmentation (as will appear afterwards) it is expressly declared that they shall from thenceforth, that is, from the time of such augmentation, be *perpetual cures and benefices*.

And this must appear to the ordinary, either of his own knowledge, or by lawful testimony.

Thus by a constitution of archbishop Reynold: *No person shall be admitted to officiate, until proof shall first be made of his lawful ordination.* Lindw. 47.

And by a constitution of archbishop Arundel: *No curate shall be admitted to officiate in any diocese, wherein he was not born or ordained, unless he bring with him his letters of orders.* Lind. 48.

(3) By the same constitution of archbishop Reynold: *No person shall be admitted to officiate, until proof shall first be made of his good life and learning.* Lind. 47.

And by the aforesaid constitution of archbishop Arundel: *No curate shall be admitted to officiate in any diocese, wherein he was not born or ordained, unless he bring with him letters commendatory of his diocesan, and also of other bishops in whose dioceses he hath continued for any considerable time; which letters shall be cautious and express with regard to his morals and conversation, and whether he be defamed for any new opinions contrary to the catholick faith or good manners.* Lind. 48.

And by Can. 48. *If the curates remove from one diocese to another, they shall not be by any means admitted to serve, without testimony in writing of the bishop of the diocese, or ordinary of the place having episcopal jurisdiction, from whence they came, of their honesty, ability, and conformity to the ecclesiastical laws of the church of England.*

All

All which is agreeable to the rule of the ancient canon law, which requireth, that no clergyman shall be received in another diocese, without letters commendatory from the bishop of the diocese from whence he removed. *Gibb. 896.*

(4) He must take the oaths of allegiance and supremacy: for by the 1 *Eliz. c. 1.* and 1 *W. c. 8.* every person who shall be promoted to any spiritual or ecclesiastical benefice, promotion, dignity, office, or ministry, shall before he take upon him to receive exercise supply or occupy the same, take the said oaths before such person as shall have authority to admit him.

(5) Such of the said curates as are admitted to a benefice with cure (as all perpetual curacies are), shall subscribe the articles of religion agreed upon in convocation in the year 1562, as rectors and vicars upon their institution, by the 13 *Eliz. c. 12. f. 3.*

(6) By *Can. 36.* No person shall be suffered to preach, to catechise, or to be a lecturer, in any parish church, chapel, or other place; except he shall first subscribe to the three articles specified in the said canon, concerning the king's supremacy, the book of common prayer, and the thirty-nine articles of religion.

And by *Can. 37.* None who hath been licensed to preach, read lecture, or catechise, and shall afterwards come to reside in another diocese, shall be permitted there to preach, read lecture, catechise, or administer the sacraments, or to execute any other ecclesiastical function, by what authority soever he be thereunto admitted; unless he first consent and subscribe to the three articles before-mentioned, in the presence of the bishop of the diocese wherein he is to preach, read lecture, catechise, or administer the sacraments as aforesaid.

(7) Also every curate, lecturer, and every other person in holy orders, who shall be incumbent or have possession of any ecclesiastical promotion, curate's place, or lecture, shall at or before his admission subscribe the declaration of conformity to the liturgy of the church of England as it is now by law established, before the bishop or ordinary of the diocese, or before his vicar general, chancellor, or commissary; and if it is a parish church in which he is to officiate, he shall receive a certificate from them of such subscription, to be read by him in the said church afterwards.

afterwards. 13 & 14 C. 2. c. 4. 15 C. 2. c. 6. 1 H. 6. c. 8.

By the eleventh article of archbishop Wake's injunctions (which are inserted at large under the title *Ordination*) it is required, that in licences to be granted to serve any cure, the ordinary shall cause to be inserted, after the mention of the particular cure provided for by such licence, a clause to this effect, *or in any other parish within the diocese, to which such curate shall move with the consent of the bishop.*

Requisites after
Licence obtained. 6. Also after licence obtained, there are several requisites to be performed; which are as follow:

(1) It seemeth that they shall take the oath of canonical obedience, if thereunto required. Thus by a constitution of archbishop Winchelsea: *To curates received to officiate in any church, it ought to be enjoined in virtue of their obedience, that they duly attend in Sundays and holidays, and other days when divine service is to be performed; and thereupon we do enjoin, that oath shall be administered and made at their admission. And we do enjoin that they shall also make oath, that they will not injure the rectors, or vicars, and governors of the churches or chapels wherein they shall officiate; but that they will humbly obey them, and give them due reverence.* Lindw. 70.

And thereupon we do enjoin that oath shall be administered] But this, not of necessity (saith Lindwood); but only if the rector or vicar shall see cause, as if the curate shall shew tokens of stubbornness or disobedience. *Id.*

Shall be administered] By such rector, vicar, or other governor of the church. *Id.*

And made] By the curate at his entrance or admission. *Id.*

Governors of the churches] That is, such as are neither rectors nor vicars; as deans, provosts, masters, wardens, and such like. *Id.*

And give them due reverence] In the common instances of subordination and respect; and also in performing the usual services in the publick worship of God. Lindw. 71.

And by another constitution of the same archbishop: *Stipendiary priests, who shall celebrate the divine offices, shall not receive any oblations, portions, obventions, perquisites, or any part thereof, especially oblations for the bodies of the dead when brought to the church to be buried, without licence*

licence of the rectors or vicars of the churches where they shall officiate; nor in any manner carry them away to the prejudice of the rectors or vicars of the churches aforesaid or of their substitutes; lest they incur the sentence of the greater excommunication in that behalf ordained. And the said priests on the Sunday or holiday after their admission, shall swear before the rectors, vicars, or their deputies, during the solemnity of the publick worship, (or otherwise before the ordinaries of the respective places,) looking upon the holy books there lying open, that they will in no wise do any damage or prejudice to the churches or chapels parochial wherein they perform divine service, or to the rectors or vicars thereof, or to those who represent them, or who have interest therein. as to the oblations, portions, obventions, perquisites, trentals, or other rights whatsoever, or howsoever called; but that as much as in them lieth, they will secure and preserve them from damage in all and singular the premisses. And the said priests shall also specially swear, that they will by no means raise, sustain, or foment hatred, scandal, quarrels and contentions, between the rector and parishioners; but that as much as in them lieth they will promote and preserve concord between them. And the said priests shall not presume to celebrate divine service in such churches or chapels until they shall have taken the oath in form aforesaid; provided that the rectors or vicars or others aforesaid shall require them so to be sworn: and if they shall presume to celebrate divine service in the place so forbidden to them contrary to this prohibition; they shall thereby incur irregularity, besides the other penalties which the canons inflict upon the breakers of holy constitutions. And if the aforesaid curates, being so sworn as aforesaid before a competent judge, shall be convicted by lawful proof of having broken their oath; they shall be intirely removed, and as perjured persons shall be interdicted from the celebration of divine offices, until they shall be canonically dispensed withal. And the said rectors or vicars, or their deputies, ought assably to receive the oaths aforesaid; and keep in their churches a written copy of the premisses and other things ordained in that behalf. Lind. 110.

Stipendiary priests.] This constitution seemeth to have been intended, not with respect to curates in general, but only such of them as had salaries appointed by particular founders, for praying for the souls of them and their friends or posterity: for such were the stipendiary priests; who officiated in chantries founded and endowed for the purposes aforesaid.

Perquisites.] Denarios pro requestis: or, as it is afterwards expressed in this constitution, *denarios perquisitis*:

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that

that is, pence given for prayers for departed souls in the offices of the church. *Johns. Winch.*

On the Sunday or holiday after their admission] By the rector or vicar or their deputies. *Lind. 110.*

Shall swear before the rectors, vicars, or their deputies] By which deputies are meant parish priests, or others whom in their absence they have deputed to be their agents or proctors. *Lind. 111.*

Or who have interest therein] As their farmers, or persons who have a right to a certain portion of the obventions. *Lind. 111.*

(2) By the 13 & 14 C. 2. c. 4. Every person who shall be put into any ecclesiastical promotion shall within two months, (or in case of impediment to be allowed by the ordinary, then within one month after such impediment removed,) in the church or chapel belonging to his said promotion, read the morning and evening prayers, and declare his assent thereunto; on pain of deprivation *ipso facto*.

(3) He must also within two months, or at the time when he reads the morning and evening prayers as aforesaid (on the like pain of deprivation *ipso facto*) read and assent to the thirty-nine articles, if it be a place with cure; because, altho' it is said in the statute of the 13 Eliz. c. 12. that this is to be done in two months after *induction*, and in the case of curates there is no *induction*, yet when the having cure of souls is the foundation of reading and assenting, wherever there is cure of souls the *induction* may be well interpreted of any actual possession whatsoever. *Wals. c. 15. 13 El. c. 12. 23 G. 2. c. 28.*

(4) Also by the aforesaid statute of the 13 & 14 C. 2. c. 4. Every curate, lecturer, and every other person in holy orders, who is incumbent or in possession of any ecclesiastical promotion, curate's place, or lecture, shall within three months after his subscription as aforesaid of the declaration of conformity, in the *parish church* where he shall officiate as aforesaid, read the ordinary's certificate thereof and again make the same declaration; on pain of deprivation *ipso facto* (except there be some lawful impediment, allowed and approved by the ordinary, 23 G. 2. c. 28.)

And what was said concerning *induction* under the last head seemeth equally applicable to the words *parish church* in this place; namely, that in cases where subscription of the declaration before the ordinary was necessary, the same

same necessity shall continue for publickly reading the certificate of such subscription, and making again the same declaration, whether it be strictly in the *parish church*, as is the case of perpetual curates, or in a chapel of ease augmented (which by the statute hereafter following is made a perpetual cure).

(5) Finally, by the 1 G. 2. c. 13. and 9 G. 2. c. 26. All ecclesiastical persons shall, within six months after their admission to any ecclesiastical preferment, benefice, office or place, take the oaths of allegiance, supremacy, and abjuration, in one of the courts at Westminster, or at the general or quarter sessions; on pain of being incapacitated to hold the same, and of being disabled to sue in any action, or to be guardian, or executor, or administrator, or capable of any legacy or deed of gift, or to bear any office, or to vote at an election for members of parliament, and of forfeiting 500 l.

7. By *Can. 48.* No curate or minister shall serve more than one church or chapel in one day; except that chapel be a member of the parish church, or united thereunto; and unless the said church or chapel where such a minister shall serve in two places, be not able in the judgment of the bishop (or ordinary of the place having episcopal jurisdiction) to maintain a curate.

None to serve more than one church or chapel in one day.

8. By a constitution of archbishop Islip, *curates serving a cure shall be content with six marks a year*: but by a constitution of archbishop Sudbury, this is enlarged to *eight marks, or their board and four marks, by reason of the difference of the times.* Lind. 240.

Salary.

Which constitutions, altho' become obsolete by the decrease in the value of money, yet do inform us in general of the proportion thereby intended, which is, that the curate should receive double of what would reasonably pay for his board. From whence also we may collect in some degree the value of money at the time of the latter constitution, which was in the year 1378, being the second year of king Richard the second; forasmuch as the ordinary price of a man's board by the year at that time was estimated at four marks.

In these days, with respect to assistant curates, who are to be paid by the incumbents that employ them; in order to prevent disputes, it is usual for the ordinary to require that a certain sum be appointed in the nomination, according to the form above expressed.

Vql. II.

* F 2

And

And by the tenth article of archbishop's Wake's directions beforementioned, it is required, that in the instrument of licence granted to any curate, the ordinary do appoint him a sufficient salary, according to the power vested in him by the laws of the church, and the particular direction of the late act of parliament for the better maintenance of curates.

Which act is that of the 12 *An. fl.* 2. c. 12. and is for the curates of non-residents only; by which it is enacted as followeth: *Whereas the absence of beneficed ministers ought to be supplied by curates that are sufficient and licensed preachers, and no curates or ministers ought to serve in any place without the examination and admission of the bishop of the diocese, or ordinary of the place, having episcopal jurisdiction; but nevertheless, for want of sufficient maintenance and encouragement of such curates, the cures have been in several places merely supplied: it is enacted, that if any rector or vicar having cure of souls, shall nominate and present any curate to the bishop or ordinary, to be licensed or admitted to serve the cure of such rector or vicar in his absence; the said bishop or ordinary, having regard to the greatness of the cure and the value of the ecclesiastical benefices of such rector or vicar, shall, on or before the granting such licence, appoint by writing under his hand and seal, a sufficient certain stipend or allowance, not exceeding 50 l. a year, nor less than 20 l. a year to be paid or answered at such times as he shall think fit, by such rector or vicar to such curate for his support and maintenance. And in case any difference shall arise between any rector or vicar and his curate touching such stipend or allowance, or the payment thereof; the bishop or ordinary, on complaint to him made, shall summarily hear and determine the same; and in case of neglect or refusal to pay such stipend or allowance, may sequester the profits of such benefice, for or until payment thereof.*

[The 36 G. 3. c. 83. after reciting the 12 *An. fl.* 2. c. 12. and that in many places the provision made by the said statute for the support and maintenance of the curates mentioned in it is now become insufficient, enacts, that it shall and may be lawful for the bishop or ordinary to appoint, under his hand and seal, any stipend or allowance for any curate heretofore nominated or employed, or hereafter to be nominated or employed, not exceeding 75 l. *per annum*, over and besides, in livings where the rector or vicar does not personally reside four months in the year at least, the use of the rectory or vicarage-house, and the garden

garden and stable thereunto belonging, such use to be granted to the said curate for the space of 12 calendar months by the authority of the bishop or ordinary, under his hand and seal, with power in the said bishop or ordinary to renew the grant from time to time, or a further sum not exceeding 15 l. *per annum* in lieu of such house garden and stable, in case there shall be none such, or it shall appear to the bishop or ordinary not to be convenient to allot and assign the same to such curate; which said stipend or stipends shall be paid and recovered in such and the same manner as the stipend payable under and by virtue of the said act: provided always, that the said house garden and stable shall be for the use of the said curate and his family, only during his actual residence in the said rectory and vicarage-house. *f. 1.*

Provided also, that the bishop or ordinary shall have power, at any time, under his hand and seal, to revoke the grant to the said curate of the said house garden and stable, or any of them; and also to insert in such grant, such terms and conditions to be observed on the part of the curate as he shall think reasonable; and also that the curate shall peaceably deliver up the possession of the premises granted to him at the expiration or other sooner determination of the grant thereof; and in case he shall refuse so to do, he shall forfeit and lose to the rector or vicar all such parts of his stipend as shall then be unpaid, or shall thereafter become due, and also the sum of 50 l. to such rector or vicar, and which shall be recoverable in an action of debt. *f. 2.*

The ordinary may also appoint the like stipend, with the like remedies, to the officiating curates of churches augmented by queen Anne's bounty, and to the officiating curates of perpetual curacies, although not augmented by the said bounty, if they have become considerable in value by the improvement of the tithes or glebe of which they happen to be endowed, or by other circumstances. *f. 3 & 5.*

All churches curacies and chapels augmented by queen Anne's bounty shall be subjected to the same rules as benefices with respect to the avoidance of other benefices; and shall be considered as benefices presentative, so as that the licence thereto shall operate in the same manner as institution to the said benefices, and shall render voidable other livings in like manner as institution to the said benefices;

but all such benefices as were held in conjunction with augmented cures before the passing of this act, shall continue to be held by the present incumbents therewith, until some other cause of avoidance shall arise after the passing of the act. *f. 3 & 4.*

And whereas it is expedient that the authority of ordinaries to license curates should be further explained, enlarged, and confirmed, it is enacted, that it shall be lawful for the ordinary to license any curate, who is or shall be actually employed by the rector, vicar, or other incumbent of any parish church or chapel, although no express nomination of such curate shall have been made either in words or in writing to the ordinary by the said rector, vicar, or other incumbent; and that the ordinary shall have power to revoke summarily and without process any licence granted to any curate within his jurisdiction, and to remove such curate for such good and reasonable cause as he shall approve; subject nevertheless to an appeal, as well in the case of a grant of a licence to a curate who has not been nominated, as in the revocation of a licence granted to a curate; such appeal to be made in either case to the archbishop of the province, and to be determined in a summary manner. *f. 6.*

By the several stamp acts a duty of 15 s. was imposed on all licences, which having been found burdensome to stipendiary curates appointed by licence to perform the office of curate in a parish church upon the nomination of the rector or vicar thereof, was repealed by 28 G. 3. c. 28.]

And in the faculty of dispensation of plurality, order is taken, that there shall be a residing curate, if the revenues of the church will conveniently bear it, and that such curate shall have a competent and sufficient salary, to be assigned by the proper ordinary at his discretion; or if he shall not take due care therein, then by the archbishop granting the dispensation, or his successors.

And by the statute of the 13 Eliz. c. 20. He who is curate to a pluralist, in that benefice on which the incumbent doth not most ordinarily reside, hath the privilege of leasing that benefice reserved to him only; but he forfeiteth his lease, if he be absent above forty days in one year.

As to the salaries of *perpetual* curates; whilst the impropriations were in the hands of monks and other ecclesiastical

ecclesiastical persons and bodies; the bishop had power to ascertain, increase, or lessen the salaries of these as well as other curates, as he had also of augmenting vicarages endowed, if he saw occasion: but since these impropriations are fallen into the hands of laymen, this hath not been allowed. So that now, in effect, (Mr. Johnson says) the impropriators have these cures served by whom, and at what rates they please. *Johns.* 89.

If the bishop assign the salary, the curate's most effectual remedy for his pay, is to apply to the ecclesiastical court; for there, in default of payment, a sequestration may be served on the benefice: but if the curate have no licence, he cannot sue in that court. *Johns.* 87.

If he sue for his salary at the common law, he must prove an agreement betwixt himself, and the incumbent: but in such case he may be called upon to prove, that he made the subscriptions and declarations before mentioned, and otherwise qualified himself as the law directs. *Johns.* 87.

H. 1672. *Pierfon and Atkinson.* The plaintiff, having a dispensation for two benefices, agreed with the defendant to serve one of them for 22l. a year. The defendant made his application to the bishop to enlarge his stipend. The bishop ordered, that the plaintiff should allow him 32l. a year. The plaintiff paid him his 22l. according to agreement. And the curate libelled in the spiritual court, for the addition made by the bishop. Upon which the plaintiff moved for a prohibition. The curate's counsel insisted, that this being an allowance by order of the bishop, was properly suable in the ecclesiastical court. But the court granted a prohibition. For there being a contract between the parties, the bishop had no power to make any order: but if the curate had served the cure, and made no agreement, then the bishop ought to have allowed him what he thought reasonable, in the nature of a quantum meruit. *Freem.* 70.

E. 19 G. 3. *Martyn and Hind.* This was a case reserved for the opinion of the court. The cause had been tried at the sittings in London after last Hilary term. The declaration stated, that the defendant, on the 13th of February 1769, by an instrument in writing, undertook and promised to retain and continue the plaintiff to officiate as curate in the parish church of St. Ann Westminster, until otherwise provided of some ecclesiastical preferment, unless by fault by him committed he

should be lawfully removed, and to pay him 50 guineas a year during that time; that the plaintiff had not been provided of any other ecclesiastical preferment, nor lawfully removed, and that the defendant had not, from the said 13th of February 1769, retained and continued him curate of the said church, and permitted him to officiate therein, and had not paid the said 50 guineas a year. The case stated the instrument or title on which the action was brought, which was in these words: "To the right reverend father in God Richard lord bishop of London. These are to certify your lordship, that I *Richard Hind*, rector of St. Ann Westminster, in the county of Middlesex, and your lordship's diocese of London, do hereby nominate and appoint the reverend *Thomas Martyn* to perform the office of a curate in my church of St. Ann aforesaid, and do promise to allow him the yearly sum of 50 guineas for his maintenance in the same, and to continue him to officiate in my said church until he shall be otherwise provided with some ecclesiastical preferment, unless, by fault by him committed, he shall be lawfully removed from the same; and I hereby solemnly declare, that I do not fraudulently give this certificate to entitle the said *Thomas Martyn* to receive holy orders, but with a real intention to employ him in my said church, according to what is before expressed. Witness my hand this 13th day of February 1769. *R. Hind*." The case then stated, that on the 6th of July 1778, the church of St. Ann had become vacant, on the defendant's having taken other preferment, namely, the living of Rochdale, and that he had paid the plaintiff his salary as curate, up to that time.

And here it is necessary to go back to a former trial between the said two parties, which was as follows. About the year 1776, upon a disagreement between *Hind* and *Martyn*, *Hind*, after giving him six months notice to quit the curacy, had refused to permit *Martyn* to officiate, and had discontinued the payment of his salary. Upon which, *Martyn* brought an action on the written instrument above set forth, and obtained a verdict for the arrears then due. But the question, whether he could maintain the action, being brought before the court in Easter term 16 G. 3; on a motion for a new trial, it was looked upon as a matter of importance, and entirely new; and, after it had been fully argued at the bar, the court took time to con-

sider. The principal objections made to the action on that occasion were, 1. That the instrument did not contain any contract between the rector and curate, nor any promise from the curate to the rector. That it was merely an engagement and indemnity by the rector to the bishop, founded on the statute of 12 An. and on the canons, by which the bishop if he ordains a man who has no curacy or preferment, is himself liable to maintain him. That if any person was intitled to sue the defendant, it was the bishop. That *Martyn* was not a party to the instrument, and that the undertaking contained in it was, as to him, without consideration. That there was no mutuality of obligation between *Hind* and him, for that he might cease to act as curate whenever he pleased. 2. It was said, that *Martyn* had never obtained a regular licence (which ought to be under seal) to officiate as a curate, which it was incumbent on him to have done, in order to intitle himself to the benefit of *Hind's* undertaking, supposing it could be considered as an engagement to him. That a licence was in the nature of an investiture to a curate; and that, not being licensed, he was certainly removeable at the pleasure of the rector.—In answer to which objections, it was argued, 1. That the title was in substance and effect an engagement with the plaintiff. That the words are, *I do promise to allow him*, not, *I promise to indemnify you* (the bishop). That, if the instrument had been a deed under seal, none but persons strictly parties to the deed could have maintained an action upon it; but the case is different with regard to a common undertaking in writing like the present. That it has been determined in the case of *Dutton and Poole*, 1 Ventr. 318. that on a promise made to one person for the benefit of another, an action may be maintained by the person for whose benefit the promise was made. That 50 guineas was more than is required by any canon or act of parliament, and therefore if an allowance to the extent required by law should be considered as an indemnity to the bishop, yet a salary exceeding that allowance could only arise from a contract between the rector and curate. That the consideration of the salary is the performance of the duty. 2. It was answered as to the other objection, that no part of the canon law makes a licence necessary. That the act of uniformity requires it for lecturers and preachers, but for no other persons. And as to the cases mentioned to shew that all curates are removeable at pleasure, none of them

hath established that doctrine.—Afterwards, in the same term, Lord Mansfield delivered the opinion of the court : At the trial, the defendant attempted to shew, that the plaintiff was lawfully removed *for fault by him committed*, and offered evidence to prove the irregularity of the plaintiff's life and behaviour ; but I would not suffer that evidence to be given ; being of opinion, either that the rector ought to have represented his conduct to the bishop, and applied to him to remove him, or if he himself could remove him on that account, that he ought to have notified to him the cause of his removal to be his immoral behaviour, which he had not done. I am still of the same opinion as to that part of the case, as at the trial, and no objection hath been made to it on the argument. But I desire it to be understood, that this doth not imply an opinion that the bishop may not remove a curate, nor even that the rector may not, for just cause properly notified to the curate. Those points still remain open. As to the 1st objection, it appears from the canon, that a pecuniary provision is not the only object of a title, but that one purpose of it is to assure the bishop that the person to be ordained hath some church where he may exercise his function. And if after being certified of the fact, the bishop ordains him, and he is afterwards removed, the bishop is not liable to maintain him. And therefore the bishop in this case can have no claim of indemnity against the defendant. The title is only a certificate to the bishop of the fact, that the rector has undertaken to employ him, to pay him, and to continue him in the curacy till provided of some other ecclesiastical preferment. It is difficult to conceive, how any question could be made on this point, or how a doubt could have been entertained in the case of *Dutton* and *Poole*, which, however, was not near so strong as the present. As to the 2d objection, the bishop having ordained the plaintiff on this very title, there surely cannot be a stronger licence. Whether it is such as would satisfy some penal statutes, may be a critical question, but we are of opinion that it doth not lie in the defendant's mouth to say that *Martyn* has no licence, when he himself hath admitted him to act as his curate, and has never before objected to him on this account, or given him notice and an opportunity of obtaining one in form.—And the rule for a new trial was discharged, and judgment entered for the plaintiff.

The

The question now upon the case reserved in the second action, was, whether the plaintiff could recover the arrears of his salary of 50 guineas, from the time of the defendant's quitting the rectory of St. Ann. For the plaintiff it was contended, that the undertaking by *Hind* did not determine by his ceasing to be rector of St. Ann. It was a permanent agreement to provide for the plaintiff till he should obtain some other church preferment. It could not be voided by the voluntary act of the defendant, but if he had put it out of his own power to continue him in the exercise of his function of curate of St. Ann, he was still bound to pay him the salary. The nature of a title to the bishop is not a precarious provision, dependent on the will of the person who gives it, but certain and only determinable by the misconduct, or preferment, of the person to whom it is given. To prove this, several cases were referred to in the register of archbishop Winchelsea, which are mentioned in Gibson's Codex; particularly, an order from the archbishop to the bishop of St. Asaph, to compel John rector of Goldfield to pay the annual sum of five marks to Amianus de Goldfield, to whom the said John had given a title for that sum, until he should be provided for; and two orders from the archbishop, one to a bishop to provide for a clergyman whom he had ordained without a title, and another of the like purport to a bishop's executors to oblige them to provide for one whom the bishop had ordained without a title. For the defendant it was insisted, that every sentence in the instrument confined the undertaking to the time of continuance in the rectory of St. Ann. It could not bind his successor, and certainly did not bind him to continue all his life-time rector of the parish. The consideration for which the 50 guineas were to be paid was the performance of the duty of a curate. The contract would want a mutuality, if it extended beyond *Hind's* continuance in the rectory of St. Ann, for he could not compel the plaintiff to officiate as his curate at Rochdale, his present living. An engagement to pay 50 guineas, independent of any clerical function, would not have been a title upon which the bishop could have ordained the plaintiff. By lord *Mansfield*: There does not seem to me to be any colour whatever for the present demand. The question is, what *Hind* has undertaken to do. He could not turn the plaintiff out at pleasure; but there is no pretence to say, that he has undertaken for himself, or his executors, to maintain him for life, or to continue all his own life-

life-time rector of St. Ann. The question here is not, whether this is a good title or not; although it should seem that it is. They commonly run in this form, and the curate takes the risque of the rector's quitting the living. A man may give a more permanent title, but the words of this instrument clearly confine the undertaking to the time of *Hind's* continuing rector of St. Ann. And the defendant had judgment. *Douglas*. 137. (r)

Residence.

9. By the last article of archbishop Wake's directions before mentioned it is ordered, that the bishop do take care as much as is possible, that whosoever is admitted to serve any cure, do reside in the parish where he is to serve; especially in livings that are able to support a resident curate: and where that cannot be done, that they do at least reside so near to the place, that they may conveniently perform all their duties both in the church and parish.

And if the curate do not comply, the ordinary may withdraw his licence.

Now removed.

10. By a constitution of Edmund, archbishop of Canterbury: *We admonish the rectors of churches, that they do not endeavour to remove their annual curates, without reasonable cause; especially if they be of honest conversation, and have laudable testimony thereof* Lind. 310.

Without reasonable cause] Of which it seemeth that the ordinary shall be judge, who granted the licence; who may, at his discretion, displace such curate, by withdrawing his licence, without formal process of law. *Johns*. 88.

And as to perpetual curates; these also are licensed by the bishop as well as others; and Mr. Johnson says, he is assured, that their licences do run in the same form, at least in many places, with the licences of other curates, and particularly, to continue only during the bishop's pleasure; and yet for distinction sake, they are called perpetual curates; and indeed, whatever power the bishops have in removing such curates at pleasure, yet it is seldom or never made use of. *Johns*. 89.

(r) This case is also reported in *Cowp*. 437. where it appears that on the first trial it was objected that Martyn was appointed *reader of prayers* in the same parish, for which he had a salary of 30l. per annum, which the counsel for the defendant contended to be an *ecclesiastical preferment* within the meaning of the agreement between him and Hind. But the court over-ruled the objection. See title *Reader*.

In the case of the curate of *Orpington*, *H. 27 & 28 C. 2.* who was appointed by the impropriator, and licensed by the archbishop as ordinary, the court held, that being but a curate at will, and not instituted and inducted, he was not an *incumbent* within the statute of the 13 *El. c. 10.* nor liable to dilapidations. 3 *Kebl.* 614.

So in the case of *Wood and Birch*, *H. 10 W.* Wood pretending to be curate in a chapel of ease in the parish of *Preston*, sued the vicar of the parish in the spiritual court, for the arrears of a pension claimed by prescription; and a prohibition was granted, unless cause shewed: for that the curate was removable at the will of the parson, and so cannot prescribe, but his remedy must be by *quantum meruit*. 2 *Salk.* 506.

And in the case of *Price* against *Pratt* and others, *M. 1729.* The plaintiff *Price* preferred his bill as perpetual curate of *Bovington*, being a chapel annexed to the church of *Hemel-Hemsted* in the county of *Hertford*, against the defendants inhabitants and occupiers of lands within the said chapelry. He made his title under a nomination to his curacy in the year 1716, by the then vicar of *Hemel-Hemsted*, who also gave him by the same instrument, the small tithes in *Bovington*, with power to sue for them in his (the vicar's) name. He also set forth a licence to preach from the then bishop of *Lincoln*: and also that upon the said vicar's death, his successor the present vicar in the year 1722, granted him a new nomination to this curacy expressly for life, with like power to sue for the small tithes in both their names: but though he took a second nomination, yet that by the first, and the bishop's licence, he was sufficiently entitled to the tithes; because by such nomination he became perpetual curate. But by the court: The bill must be dismissed, for no title appears in the plaintiff; for though a curate is appointed by a vicar, either generally, or expressly for life, yet such appointment is in its own nature revocable at the common law, even without any cause assigned, and by the ecclesiastical law upon cause shewn; so that the plaintiff had not such a permanent interest, as to claim any tithes. *Burb.* 273.

But notwithstanding these adjudications, the principal point, whether the appointments of these curates are revocable at pleasure, seemeth not to have been fully considered upon solemn argument; but that they are so, seemeth to have been taken for granted, and that upon a principle which perhaps will not be admitted, namely, that at the common

common law they are revocable without any cause assigned, for after they are nominated by the impropriator, and licensed by the ordinary, it seemeth that they are not to be removed but for such cause as would deprive a rector or vicar.

With regard to such of the perpetual curacies as have been augmented by the governors of queen Anne's bounty, there is no doubt, but by the act of parliament here next following, the curates thereof are not removable at pleasure; and therefore the form of the licence in that case at least ought to be altered.

And as to the rest it should seem, that such curacies are *beneficia ecclesiastica*. Lord Coke says, *Beneficium* is a large word, and is taken for any ecclesiastical promotion or spiritual living whatever. (2 *Inst.* 29.) And in the case of *Mosely and Warburton*, *M.* 9 *W.* it was said by the court, that a *prebend* is an ecclesiastical *benefice*. (1 *Salk.* 321.) And Dr. Gibson, observing upon the aforesaid case of *Wood and Birch*, where it was held that the curate was removable at the will of the parson, and consequently could not prescribe; says, this is true of an assistant curate to a resident rector or vicar, but not of a curate properly speaking, who has the *curam animarum* committed to him *pro tempore* by the bishop, in the absence of the incumbent. (*Gibb.* 896.) And in the case of perpetual curacies in particular, the court of king's bench will grant a mandamus to the bishop to admit and licence a curate; which implies a right in the person nominated to such office or promotion: as was done by the court in the case of the dean and chapter of *Carlisle*, with respect to the curacy of *St. Cuthbert's*; which case is set forth at large, under the title *Deans and chapters* (s).

(s) The reasons which have induced the court of king's bench of late to refuse a mandamus in this case have arisen from the nature of that writ. See *ante* 4. in the note. But that a perpetual curacy is to be considered as a benefice with cure of souls, and that the curate must therefore obtain the bishop's licence, and subscribe the 39 articles and declaration of conformity, before he can be admitted to his benefice and maintain an action of money had and received for the profits of it, was the opinion of the court of king's bench in *Powel v. Milbank*, 1 *T. Rep.* 399. See *Woodson*, 14. in the note. This case was afterwards litigated in the court of C. P. for which see *Donative*, 7, 8.

11. By the 1 G. II. c. 10. *Whereas the late queen Anne's bounty to the poor clergy was intended to extend, not only to parsons and vicars who came in by presentation or collation, institution, and induction; but likewise to such ministers who come in by donation; or are only stipendiary preachers or curates; most of which are not corporations, nor have a legal succession, and therefore are incapable of taking a grant or conveyance of such perpetual augmentation as is intended by the said bounty; and in many places it would be in the power of the donor, impropiator, parson, or vicar, to withdraw the allowance which was before paid to the curate or minister serving the cure; or in case of a chapelry, the incumbent of the mother church might refuse to employ a curate and officiate there himself, and take the benefit of the augmentation, whereby the maintenance of the curate would be sunk instead of being augmented; it is enacted, that all such churches, curacies, or chapels which shall be augmented by the governors of the said bounty, shall be from thenceforth perpetual cures and benefices, and the ministers duly nominated and licensed thereunto shall be in law bodies politic and corporate, and have perpetual succession, and be capable to take in perpetuity; and the impropiators or patrons of any augmented churches or donatives, and the rectors and vicars of the mother churches whereunto such augmented curacy or chapel doth appertain, shall be excluded from receiving any profit by such augmentation, and shall pay to the ministers officiating such annual and other pensions and salaries, which by ancient custom or otherwise, of right, and not of bounty, they were before obliged to pay.*

Chapels of ease
and perpetual
curacies aug-
mented,

And for continuing the succession in such augmented cures, hereby made perpetual cures and benefices, and that the same may be duly and constantly served; if they shall be suffered to remain void for six months, they shall lapse in like manner as presentative livings.

And by this statute the augmented chapels being expressly made perpetual cures and benefices; if the incumbents of such chapels have not before such augmentation been qualified, or qualified themselves, according to the requisites above specified for perpetual curates, it may be advisable, upon such augmentation made, that they be nominated de novo, and then perform the several particulars within the times required: Which nomination may be in this or the like form;

" To the right reverend father in God C. lord bishop
" of ——— A. B. of ——— gentleman, sendeth greeting.
" Whereas the curacy of the chapel of ——— in the
" county of ——— and in your lordship's diocese of
" ——— is

Darrein presentment.

“ ——— is augmented, or shortly intended to be augmented, by the governors of the bounty of the late queen Anne, for the augmentation of the maintenance of the poor clergy; by reason whereof it is requisite, that a curate should be duly nominated and licensed to serve the said cure, pursuant to the statute in that case made; I the said A. B. do hereby nominate C. D. clerk, (the person employed by me in serving the said cure,) to be curate of the said chapel of ———; and do humbly pray your lordship to grant him your licence to serve the said cure, and to perform all divine offices therein accordingly. In witness whereof, I have hereunto set my hand and seal, the ——— day of ——— in the year of our Lord ———.” *Eben* 460.

Dalmatica.

DALMATICA, was one of the sacerdotal vestments; so called from its having been at first woven in *Dalmatia*. *Lind.* 252.

Darrein presentment.

AN assise of *darrein presentment*, or last presentation, lies when a man, or his ancestors under whom he claims, have presented a clerk to a benefice, who is instituted; and afterwards upon the next avoidance a stranger presents a clerk, and thereby disturbs him that is the real patron. In which case, the patron shall have this writ, directed to the sheriff to summon an assise or jury, to inquire who was the last patron that presented to the church now vacant, of which the plaintiff complains that he is deforced by the defendant: and, according as the assise determines that question, a writ shall issue to the bishop, to institute the clerk of that patron in whose favour the determination is made, and also to give damages. 3 *Blackst.* 245.

But

Deans and chapters.

79

But this course of proceeding is now become obsolete, and superseded by the writ of *quare impedit*: and the learning concerning them both is comprehended under the title *Adhowsion*.

Deacon. See Ordination.

Deans and chapters.

FOR the leases of deans and chapters, and of every member of the chapter, in their sole or aggregate capacity; see title *Leases*.

- I. Of deans.
- II. Of chapters.
- III. Of the several members of the chapter in their sole capacity; as canons and prebendaries.
- IV. Of dean and chapter, as one body aggregate.
- V. Of deans of peculiars.
- VI. Of rural deans.

I. Of deans.

I. There are four sorts of deans and deaneries; of which several kinds of and of whom the law of this realm taketh knowledge. deans.
The first is a dean who hath a chapter consisting of prebendaries or canons, subordinate to the bishop, as a council assistant to him in matters spiritual relating to religion, and in matters temporal relating to the temporalities of his bishoprick: for seeing that it was impossible but that sects, schisms, and heresies should arise in the church, it was in christian policy thought fit and necessary, that the burden of the whole church, and the government thereof, should not lie upon the person of the bishop only; and therefore it was thought necessary that every bishop within his diocese should be assisted with a council, to consult with him in matters of difficulty concerning religion, and deciding of the controversies thereof; and also for the better ordering and disposing of the things of the church, and to give their assent to such estates as the bishop should make of the tempo-

Deans and chapters.

temporalities of his bishoprick; for it was not convenient that the whole power and charge thereof should remain in any one sole person only. The *second* is a dean *who hath no chapter*, and yet he is *representative*, and *hath cure of souls*; he hath a peculiar, and a court wherein he holdeth ecclesiastical jurisdiction; but he is not subject to the visitation of the bishop or ordinary; such is the dean of *Battel* in *Sussex*, which deanry was founded by king William the conqueror in memory of his conquest; and the dean there hath cure of souls, and hath spiritual jurisdiction within the liberty of *Battel*. The *third* dean is ecclesiastical also, but the deanry is *not representative* but *donative*, nor *hath any cure of souls*, but he is only by covenant or condition; and he also hath a court and a peculiar, in which he holdeth plea and jurisdiction of all such matters and things as are ecclesiastical, and which do arise within his peculiar, which oftentimes extends over many parishes: such a dean, constituted by commission from the metropolitan of the province, is the dean of the *Archies*, and the dean of *Bucking* in *Essex*; and of such deanries there are many more. The *fourth* sort of dean, is he who is usually called the *rural dean*; having no absolute judicial power in himself, but he is to order the ecclesiastical affairs within his deanry and precinct, by the direction of the bishop, or of the archdeacon; and is a substitute of the bishop in many cases. *Hughes, c. 2. (1)*

Cathedral dean. 2. The dean which hath a chapter, such as the dean of Canterbury, St. Paul's, and the like, is set forth to be an ecclesiastical governor secular over the prebendaries, and canons in the cathedral church. *Hughes, c. 2.*

Original institution of deanries. 3. The institution of deanries, as also of the other ecclesiastical offices of dignity and power, seems to bear a resemblance and relation to the methods and forms of civil government, which obtained in those early ages of the church throughout the western empire. Accordingly, as in this kingdom, for the better preservation of the peace, and more easy administration of justice, every hundred consisted of ten districts called tithings, every tithing of ten friborughs or free pledges, and every free (or frank) pledge of ten families; and in every such tithing there was a constable or civil dean appointed, for the subordi-

(1) As to the nature and division of deanries and the mode of appointing to them, see a learned note of Mr. Hargrave to *Co. Lit.* 95.

nate administration of justice : so in conformity to this secular method, the spiritual governors the bishops divided each diocese into deanries (decennaries, or tithings), each of which was the district of ten parishes or churches ; and over every such district they appointed a dean, which in cities or large towns was called the dean of the city or town, and in the country had the appellation of rural dean. *Ken. Paroc. Ant.* 633, 634.

The like office of deans began very early in the greater *monasteries*, especially in those of the *Benedictine* order ; where the whole convent was divided into decuries, in which the dean or tenth person did preside over the other nine ; took an account of all their manual operations ; suffered none to leave their station, or to omit their particular duty without express leave ; visited their cells or dormitories every night ; attended them at table to keep order and decorum at their meals ; guided their conscience ; directed their studies ; and observed their conversation : and for this purpose held frequent chapters, wherein they took publick cognizance of all irregular practices ; and imposed some lesser penances ; but submitted all their proceedings to the abbat or prelate, to whom they were accountable for their power, and for the abuse of it. And in the larger houses, where the numbers amounted to several decuries, the senior dean had a special pre-eminence, and had sometimes the care of all the other devolved upon him alone. *Ken. Par. Antiq.* 634, 635.

And the office of dean in several *colleges* in the universities, seemeth to have arisen from the same foundation.

And the institution of *cathedral* deans seemeth evidently to be owing to this practice. When in episcopal sees, the bishops dispersed the body of their clergy by affixing them to parochial cures ; they reserved a college of priests or secular canons for their counsel and assistance, and for the constant celebration of divine offices in the mother or cathedral church, where the tenth person had an inspecting and presiding power, till the senior or principal dean swallowed up the office of all the inferior, and in subordination to the bishop was head or governor of the whole society. His office was, to have authority over all the canons, presbyters, and vicars ; and to give possession to them when instituted by the bishop ; to inspect their discharge of the cure of souls ; to convene chapters, and preside in them, there to hear and determine proper causes ; and to visit all churches once in three years within the limits of their jurisdiction. The men of this dignity

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were called *archipresbyters*, because they had a superintendence, or primacy over all their college of canonical priests; and were likewise called *decani christianitatis*, because their chapters were courts of christianity, or ecclesiastical judicatures, wherein they censured their offending brethren, and maintained the discipline of the church within their own precincts. *Ken. Par. Ant.* 634, 635.

- P^e 4. Deans of the old foundation come in by election of the chapter upon the king's conge d'eshire, with the royal assent, and confirmation of the bishop, much in the same way as the bishops themselves do: but (generally) the deans of the new foundation come in by the king's letters patents; upon which, they are instituted by their respective bishops; and then installed upon a mandate, pursuant to such institution, and directed to the chapters. *Gibf.* 173.

Which distinction between the old and new foundations came in after the dissolution of monasteries, when king Henry the eighth having ejected the monks out of the cathedrals, placed secular canons instead of them: those whom he thus regulated, are called the deans and chapters of the new foundation; such are Canterbury, Winchester, Worcester, Ely, Carlisle, Durham, Rochester, and Norwich. And besides these, he erected five cathedrals de novo, and endowed them out of the estates of dissolved monasteries, viz. Chester, Peterborough, Oxford, Gloucester, and Bristol: which were by him made episcopal sees, as also Westminster, but the bishoprick of this last place was altered again, and the monastery turned into a collegiate church by queen Elizabeth. *Johnsf.* 54.

- Id in m 10p- 5. Dr. Godolphin says, where a dean is made a bishop, with a dispensation from the king to hold the deanery notwithstanding the bishoprick, such dispensation continues him dean as before, by force and virtue of his former title, to all intents and purposes; so as that he may confirm, or make leases, or do any other act as dean, as if he had not been made a bishop at all. *God.* 112.

- inc- 6. Deanries are sine-cures, that is, they have not the cure of souls. *God.* 200. *Watf. c.* 2. (u)

Therefore persons admitted to deanries need not by 13 *El. c.* 12. to subscribe the thirty-nine articles before the ordinary; nor to read and declare their assent to the

(u) And as such are excepted from the operation of the stat. 21 *H.* 8. c. 13, against pluralities, by the proviso in section 31.

same, as persons admitted to benefices with cure are required to do by the said statute. *Gibf.* 808. 817.

But otherwise, the same oaths, subscriptions, and declarations are required to be taken and made by them, as by other persons qualifying for ecclesiastical offices.

7. Dr. *Godolphin* saith, the dean may be a layman; as ^{Whether it is a} was the dean of Durham, by special licence and dispensation from the king; but that is rare and a special case, and is not common and general, and therefore not to be brought as an example. *God.* 367. ^{lay office.}

And Dr. *Watson* says, although in former time a layman might have taken a title to a deanry; yet now by the statute of the 13 & 14 C. 2. c. 4. a person must have priest's orders to qualify him for the same. *Watf.* c. 14.

But Dr. *Gibson* saith a deanry is a promotion merely spiritual; and might never be possessed, regularly, by any person but who was of the order of priesthood. This is plain from the ancient name archipresbyter, or head presbyter of the college of presbyters, and from the several rules of the canon law, expressly requiring, that none be constituted archipresbyters, or deans, but presbyters only: — *no bishop in his church shall presume to ordain an archipresbyter or dean, unless they be presbyters (x).* Which though the gloss qualifies, by saying, *it is sufficient if he be such that in a short time he may be promoted to that order;* as being already of inferior orders; yet it was never understood, that deanries might be held, as temporal promotions, by mere laymen; which is a notion entertained by some, against all law, reason, and antiquity, upon an irregular instance or two since the reformation; and urged, that so it would still have been, had not the last act of uniformity made the order of priesthood a necessary qualification of being admitted to any ecclesiastical promotion or dignity. That it was ever made a question, whether a deanry was a mere temporal or spiritual promotion, could be owing to nothing but the instances just now referred to, and the not knowing or not considering the original nature and design of the office; in conformity to which, in the case of *Goodman* and *Turner* in the tenth year of queen Elizabeth (*Dyer* 273. b.) where the point in issue was the validity of a lease, the justices unanimously agreed, that it was a spiritual promotion, and accordingly the legality or illegality of the deprivation of *Goodman* had been tried (without any exception of either party so far as appears) in the

(x) *Dist.* 60.

spiritual courts; viz. before the bishop, archbishop, and delegates successively. *Gibf. 173. (γ)*

Deanry: dignity.

8. The title of dean is a title of dignity; which belongs to this station as having *ecclesiastical administration with jurisdiction or power annexed*, as the civilians defined a dignity in the case of *Brington and Gousley, E. 43 Bl. (z)* and more especially as coming within all the three qualifications of a dignity as laid down by *Lindwood*, — a dignity, he says, is known, 1. *From the administration of ecclesiastical affairs with jurisdiction.* 2. *From the name and preference which he hath in the choir and chapter.* 3. *From the custom of the place.* By which rule, no stations in the cathedral church, under the degree of a bishop, are dignities strictly speaking, besides those of the dean and archdeacon; unless where jurisdiction is annexed to any of the rest, as in some cases it is to prebends and others: *Gibf. 173.*

This title of dignity, as annexed to deanries, may perhaps be one reason of what the law books affirm, that if lands be given by licence to a dean and chapter of such a place, or a lease be made by them, or a writ be brought against the dean; such grant lease and writ shall be good, tho' the dean is mentioned only by his title of dignity, and not by his proper name. *Gibf. 173. (α)*

Bond given to a dean and his successors.

9. If a dean take an obligation to him and his successors, it goes to his executors; which holds true also as to a bishop, parson, vicar, and the like. *God. 55. (b)*

Possessions of deanries.

10. The bishop, dean, and chapter (that is prebendaries or canons), and all other persons belonging unto, or having any thing to do in any cathedral churches, at the first, and in ancient times, held their possessions together in gross; but afterwards for the avoiding of confusion and for better order, and for some other special causes known to the king and state of this realm, the same were after-

(γ) Mr. Hargrave, in the note above referred to, says that deans of peculiars without cure of souls, may be, and frequently are, persons not in holy orders. *Co. Lit. 95. Ed. Harg.*

(z) *Cro. Eliz. 663.*

(α) *Co. Lit. 3. a.* But in pleading he must shew his proper name. *Ib.*

(b) A bond is a chattel, and regularly no chattel can go in succession in a case of a sole corporation, *Co. Lit. 46. b.* but may by custom, as in the case of the chamberlain of London. *Fulwood's case, 4 Rep. 64.*

wards

wards by them severed and divided; and part of the lands and possessions belonging to the same church were assigned to the bishop and his successors to hold by themselves, and other parts thereof were assigned unto the dean and chapter to hold by themselves, of which lands they have ever since continued severally seized in their several capacities. *Hughes, c. 2.*

Concerning the possessions of deans and others of the new foundation, it is enacted by the 34 & 35 H. 8. c. 21. that *the king's grant to the new foundation should be good; notwithstanding any misrecital of name, place, or date.*

And by the 35 El. c. 3. *Forasmuch as divers doubts have arisen touching the surrenders of religious houses, and the validity of the erections of deans and chapters made by king Hen. 8. notwithstanding the aforesaid statute; it is enacted, that all estates of religious houses surrendered to king Hen. 8. shall be adjudged to have been lawfully in the possession of the said king, notwithstanding any defect in the surrender; and all letters patents made by the said king, for the erection foundation incorporation or endowment of any dean and chapter, shall be reputed taken and adjudged, to have been good perfect and effectual in the law, for all things therein contained, according to the true intent and meaning of the same, any thing matter or cause to the contrary thereof in any wise notwithstanding.*

Many years before this, in the eighth year of the queen, we find a bill in the house of lords (for the confirmation of late erected deanries and prebends) read a second time and committed; but it proceeded no further. Whereupon great disturbance having been given to the deans and chapters of the new foundation, under pretence, that the possessions thereof were passed by letters patents of concealment; they did this year unanimously apply themselves to the lord treasurer Burleigh, for a confirmation of them by parliament: as appears from a letter sent by them from the convocation house, bearing date Mar. 16, 1592, in which they beseech him, that by his honourable mediation and countenance, a remedy may at this parliament (by confirmation of the said grants) be obtained.

This application produced the present act, in favour of the new foundations; notwithstanding which, five years after, divers persons, labouring a dissolution of the cathedral church of Norwich, under the old pretence of concealments, brought this matter to a solemn hearing; and it was declared, that if any imperfection were in the translation made by king Hen. 8. from prior and convent

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to dean and chapter, this act had made it clear and without question. To which lord Coke subjoins, that all defects are remedied by this most excellent act of parliament, the fatal plea to all concealment as to those possessions; adding, that though the case under consideration did only concern the church of Norwich, it would serve as well for many other cathedral churches. *Gibf.* 184. 3 *Cro.* 76.

Dean to visit the chapter.

11. The dean ought to visit his chapter. *God.* 55.

And of ancient time, the canons made their confessions to the dean; and *Lindwood* says, that the canons are under the dean as to the cure of souls. *God.* 55. (c)

Dean may make a deputy.

12. The dean may make a deputy or subdean, to exercise the spiritual jurisdiction; yet such deputy cannot charge the possessions of the church, so as to confirm leases, unless it be otherwise provided by the local statutes. *God.* 55. *Watf.* c. 44. (i)

Residence of the dean.

13. Every dean shall be resident in his cathedral church fourscore and ten days, conjunction or disjunctim, in every year at the least, and then shall continue there in preaching the word of God, and keeping good hospitality, except he shall be otherwise let with weighty and urgent causes to be approved by the bishop, or in any other lawful sort dispensed with. *Can.* 42.

Dean's ecclesiastical duty.

14. Deans in cathedral and collegiate churches, shall not only preach there in their own persons, so often as they are bound by law statute ordinance or custom, but shall likewise preach in other churches of the same diocese where they are resident, and especially in those places whence they or their church receive any yearly rents or profits. And in case they themselves be sick, or lawfully absent, they shall substitute such licensed preachers to supply their turns, as by the bishop shall be thought meet to preach in cathedral churches. And if any otherwise neglect or omit to supply his course as is aforesaid, the offender shall be punished by the bishop, or by him or them to whom the jurisdiction of that church appertaineth, according to the quality of the offence. *Can.* 43.

Profits of a deanery during the vacation.

15. By the 28 *H. 8.* c. 11. The profits of a deanery during the vacation shall go to the successor, towards the payment of his first fruits.

(c) *Lind.* 327.

(d) *Noy* 93. *Palm.* 460. *Latch.* 237. 230. *Evans* v.

II. Of Chapters.

1. A chapter of a cathedral church consisteth of persons ecclesiastical, canons and prebendaries, whereof the dean is chief, all subordinate to the bishop to whom they are as assistants in matters relating to the church, for the better ordering and disposing the things thereof, and for confirmation of such leases of the temporalities and offices relating to the bishoprick, as the bishop from time to time shall happen to make. *God. 58.* Chapter, what.

And they are termed by the canonists *capitulum*, being a kind of *head*, instituted not only to assist the bishop in manner aforesaid, but also anciently to rule and govern the diocese in the time of vacation. *God. 56.*

Of these chapters, some are ancient, some new: the new are those which are founded or translated by king *Hen. 8.* in the places of abbats and convents, or priors and convents, which were chapters whilst they stood, and these are new chapters to old bishopricks; or they are those which are annexed unto the new bishopricks founded by king *Hen. 8.* and are therefore new chapters to new bishopricks. *1 Inst. 95.*

The chapter in a collegiate church is more properly called a *college*; as at Westminster and Windfor, where there is no episcopal see. *Wood, b. 1. c. 3.*

2. There may be a chapter without any dean; as the chapter of the collegiate church of Southwel: and grants by or to them are as effectual as other grants by dean and chapter. *Watf. c. 38. (e)* Chapter without dean.

In the cathedral churches of St. David's and Landaff, there never hath been any dean, but the bishop in either is head of the chapter; and at the former the chantor, at the latter the archdeacon presides, in the absence of the bishop or vacancy of the see. *Johnf. 60.*

3. One bishop may possibly have two chapters, and that by union or consolidation: and it seemeth that if a bishop hath two chapters, both must confirm his leases. *God. 58. (f)* In some places two chapters.

4. A chapter of itself, is not capable to take by purchase, or gift, without the dean, who is the head of it, or purchase. *This was agreed in Eyre's case (Mo. 51.); but whereas*

(e) 1 *Mod.* 204.

(f) *Dyer*, 282. b.

in the lease there mentioned (made by the archbishop of York) of a field in Battersea, one article was, that during the vacancy of the archbishoprick, the rent should be paid to the chapter of York, *as in their own proper right*; upon a question raised, whether a chapter could receive the rent, it was agreed that they could; because they are persons of which the law takes notice, and to whom therefore such payment might be made; and tho' it should appear afterwards that they could not receive it *in their own proper right*, that defect would not hinder the payment. *Gibf. 174. (g)*

III. Of the several members of the chapter in their sole capacity; as canons, and prebendaries.

Difference between prebend and prebendary.

1. The books do generally confound the two words *prebend* and *prebendary*: whereas the former signifieth the office, or the stipend annexed to that office; and the latter signifieth the officer, or person who executeth the office and enjoyeth such stipend.

Prebendary whence so called.

2. Lord Coke saith, a prebendary was so called a *prebendo*, from the assistance he affordeth to the bishop; whereas he had his name, on the contrary, from the assistance which the church affordeth him, in meat drink and other necessaries. *Gibf. 172. (b)*

Prebend, what.

3. A prebend, is an endowment in land, or pension in money, given to a cathedral or conventual church in *prebendum*; that is, for a maintenance of a secular priest or regular canon; who was a prebendary, as supported by the said prebend. *Ken. Par. Ant. Gloss.*

Canonry.

4. A *canonry* also is a name of office; and a canon is the officer in like manner as a prebendary; and a prebend is the maintenance or stipend both of the one and of the other. *Gibf. 172.*

Two kinds of prebendaries.

5. Prebendaries are distinguished into those which are called simple and dignitary. A simple prebendary is such who hath no cure, and who hath no more but his revenue for his support; and a dignitary prebendary hath always a jurisdiction annexed, and for this reason he is called a dignitary, and his jurisdiction is gained by prescription. *Country parf. comp. 136.*

(g) *Moore 51.*

(b) 3 *Rep. 75. b.*

6. Of common right the bishop is patron of all the ^{Prebendary,} prebends, because the possessions were derived from him, ^{how appointed,} *God. 52. (i)*

And in such case he doth prefer to them by collation, which is the same thing with institution, saving that no presentation is made; but if a prebend be in the gift of a layman, the patron doth present to the bishop, who doth institute in like manner as to another benefice (*k*); and then the dean and chapter do induct them, that is, after some ceremonies, place them in a stall in the cathedral church, to which they belong; whereby they are said to have a place in the choir. *Watf. c. 15.*

In the case of *Clarke* against the bishop of *Sarum*, *M. 11 G. 2.* A mandamus was granted to admit the plaintiff to a canonry or prebend of *Sarum*, and to institute, induct and invest him therein; tho' it was strongly opposed on the rule to shew cause, as turning the common law remedy by quare impedit into another channel. But the court said, that tho' formerly mandamus's were not so frequent, especially where the party had another remedy; yet they being found to be more expeditious and less expensive, had been given into of late. And as to their being another remedy; it might be said equally in cases where an assise or an action upon the case would try the right, and yet that was never thought a ground to deny a mandamus; so that the writ was ordered, but never issued, the parties agreeing to refer the dispute. *Strange, 1082. (l)*

Prebends are some of them donative. At Westminster, the king collates by patent; and by virtue thereof, the prebendary takes possession without institution or induction. *Johnf. 55. Watf. c. 15.*

And the king at this day is patron of most of the great prebends. *Johnf. 28, 29.*

7. No person may hold more than one prebend in the same church: and this is agreeable to the rule of the ancient canon law. *Gibf. 174. (m)*

None to have two prebends in one church.

(i) 3 *Rep.* 75. *b.* 3 *Bac. Ab.* 376.

(k) 1 *Anderf.* 241. *Sale v. Bp. of Coventry.*

(l) This case has been denied to be law. 1 *T. Rep.* 401. See on this subject, *Curates*, 4 & 10. and *Abbottson*, 14 in the notes.

(m) *Clem.* 3. 2. 6. *X.* 3. 8. 9.

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So if a prebendary accepteth of a *deanry*, his prebend is void by cession; so if he is made a *bishop*, the king presents to his prebend. *Nelf. Preb.*

But the acceptance of a deanry must be understood to be in the same church: therefore 11 *Ed.* 3. the bishop of Durham having presented a clerk to a prebend of the church of St. Andrew, and afterwards the same person being presented to a deanry in that church, it was held that the king should recover the presentation to this prebend, because one and the same person cannot possess two prebends in one and the same church (*n*); but then it must be understood of a prebendary who is a complete member of the chapter, that is, one who hath a place in the choir and a vote in the chapter; for an archdeacon may be either a dean or prebend of that church where he is archdeacon, because as such he hath no vote in the chapter. *Nelf. Preb.*

Whether a prebend is a lay-fee.

8. Formerly, a layman (*Dr. Watson* says) might have taken a title to a prebend (*o*); but now by the act of uniformity of the 13 & 14 *C.* 2. *c.* 4. no person is capable of being admitted to any ecclesiastical promotion, who is not in priest's orders. *Watf. c.* 14.

Separate possessions.

9. The possessions of the dean and chapter are for the most part divided; the dean having one part alone in right of his deanry, and each particular prebendary a certain part in right of their prebends; the residue the dean and chapter have alike; and each of them is to this purpose incorporate by himself. *God.* 52. (*p*)

For a prebendary, who hath a distinct estate, and hath also a vote in the chapter, is a corporation sole in respect of the one, and at the same time is a member of a corporation aggregate in respect of the other. *Jobns.* 61.

Quare impedit to be brought in the county where the cathedral is.

10. If the cathedral church be in one county, and the *corps* (body, or estate) of the prebend be in another county; a writ of quare impedit shall be brought in the county of the cathedral, where the office, or the foundation of the right to the corps is, and not in that where the corps lies. *Gibf.* 174. (*q*)

How to be charged to the land tax.

11. By the yearly land-tax acts — *Whereas the rents and revenues belonging to the residentiaries of the cathedral*

(*n*) *Dy.* 273. *a.* *Ed. Vail.*

(*o*) So ruled in *Bland v. Maddox*, *Cro. Eliz.* 79.

(*p*) *F. N. B.* 195.

(*q*) *Dy.* 194. *a.*

churches are chargeable to the land tax, and in some cases the overplus of the said rents and revenues, above such tax repairs and other charges, is to go in shares for the maintenance of the said residentiaries, which shares are diminished by the said land tax; in such cases the said residentiaries shall not be further chargeable as enjoying offices of profit out of the said rents and revenues.

12. It doth not appear that canons or prebendaries have ^{Prebend a fine-} cure of souls in any respect; they are indeed for the most ^{cure} part instituted, but not to the cure of souls. *Johns. 86.*

So that a prebend and a parochial benefice are not incompatible; but both may be holden together, without any dispensation. *Johns. 91. (r)*

And for the same reason, he who takes a title to a prebend, is not thereby obliged by the 13 *El. c. 12.* to subscribe or read the thirty-nine articles; but otherwise, he must take the same oaths, and make and subscribe the same declarations, as other persons qualifying for ecclesiastical offices.

13. No prebendaries nor canons in cathedral or college ^{Residence.} churches, having one or more benefices with cure (and not being residentiaries in the same cathedral or collegiate churches), shall under colour of their said prebends, absent themselves from their benefices with cure, above the space of one month in the year; unless it be for some urgent cause, and certain time, to be allowed by the bishop. And such of the said canons and prebendaries, as by the ordinances of the cathedral or collegiate churches do stand bound to be resident in the same, shall so among themselves sort and proportion the times of the year, as that some of them always shall be personally resident there; and all such residentiaries shall, after the days of their residency appointed by their local statutes or customs expired, presently repair to their benefices, or some one of them, or to some other charge where the law requireth their presence, there to discharge their duties according to the laws in that case provided. And the bishop of the diocese shall see the same to be duly performed and put in execution. *Can. 44.*

14. Prebendaries and canons in every cathedral and ^{Preaching.} collegiate church, shall not only preach there in their own persons, so often as they are bound by law statute

(r) A prebend is excepted from the operation of the stat. 21 *H. 8. c. 13.* against pluralities, by the proviso of § 31.

ordinance or custom, but shall likewise preach in other churches of the same diocese where they are resident, and especially in those places where they or their church receive any yearly rents or profits. And in case they themselves be sick, or lawfully absent, they shall substitute such licensed preachers to supply their turns, as by the bishop shall be thought meet to preach in the cathedral churches. And if any otherwise neglect or omit to supply his course, as is aforesaid, the offender shall be punished by the bishop, or by him or them to whom the jurisdiction of that church appertaineth, according to the quality of the offence. *Can. 43.*

Profits of a prebend, during the vacation.

15. Dr. *Godolphin* saith, that after the death of a prebendary, the dean and chapter shall have the profit. *God. 52.*

But by the statute of the 28 *H. 8. c. 11.* the profits of a prebend, during the vacation, shall go to the successor: towards the payment of his first fruits.

In order to reconcile which, perhaps the distinction may be this: that the issues of those possessions which he hath in common with the rest of the chapter, shall after his death be divided amongst the surviving members of the chapter; but the profits of those possessions which he hath in his separate capacity, as a sole corporation of himself, shall be and inure to his successor.

Dilapidations.

16. A prebendary leaving a house, by death or cession, out of repair; he or his executors shall be liable to a suit of dilapidation, tho' it was not annexed to the prebendal stall. This was declared in the court of king's bench, *T. 35 C. 2.* in the case of Dr. *Sands* against the executors of his predecessor, the residentiary prebendary in the church of *Wells*, where the bishop appoints to each prebendary what house he thinks fit. For altho' the house is not parcel of any particular prebend, it must be assigned to some particular prebend, and when it is so assigned it is part of the prebend, and shall be liable to a suit for dilapidations. Wherefore in this case the court refused to grant a prohibition. *Gibf. 174. Skin. 121. (s)*

IV. Of

(s) In a late case from the church of *Ely*, it was decided that an action on the case for dilapidations of a prebendal house, may be maintained at common law by a succeeding prebendary against his predecessor who had resigned. But as it

IV. Of dean and chapter as one body aggregate.

1. Dean and chapter is a body corporate spiritual, consisting of many able persons in law, namely, the dean who is chief, and his prebendaries; and they together make the corporation. *God. 51.* Dean and chapter, what.

2. They were originally selected by the bishop from amongst his clergy, as counsel and assistants to him; but they derive their corporate capacity from the crown. *God. 52.* How incorporated.

3. By degrees the dependence of the dean and chapter on the bishop, and their relation to him, grew less and less; till at last the bishop hath little more left to him than the power of visiting them, and that very much limited: and he is now scarcely allowed to nominate half of those to their prebends, who all were originally of his family. *Johns. 54. 2 Roll's Abr. 229.* Their dependence on the bishop.

Nevertheless, the dean and chapter may not alter the ancient and approved usages of their church, without consent of the bishop; and if they do, such innovations are declared void by the canon law. *Gibbs. 174.*

4. In the Saxon times, there was no delegation of the bishop's jurisdiction, to the several officers of the bishop's courts; for the bishops did sit in person in the county courts, and there heard ecclesiastical causes. *1 Still. Eccl. cases, 242.* Their jurisdiction.

But now the exercise of the bishop's power is sometimes restrained by ancient compositions; as is seen in the two ancient ecclesiastical bodies of St. Paul's and Litchfield. And where the compositions are extant, both parties are equally bound to observe the conditions and limitations thereof. By the remissness and absence of the bishops of Litchfield from their see, in going to Chester, and then to Coventry, the deans had great power lodged in them, as to ecclesiastical jurisdiction there; and after long contests, the matter came to a composition in the year 1428;

it appeared by the statute, that the receiver of the chapter ought to require the prebendaries to repair their houses, furnishing the necessary materials from the funds of the church, and he had neglected to do this, the plaintiff recovered from his predecessor only the expence of workmanship, the court being of opinion that the materials ought to be furnished him by the church. *Radcliff v. Doyly, 2 T. Rep. 630.*

by which, the bishops were to visit them but once in seven years, and the chapter had jurisdiction over their own peculiars. So in the church of Sarum, the dean hath very large jurisdiction; which makes it probable to have been very ancient; but upon contest it was settled by composition between the bishop, dean, and chapter in the year 1391. And where there are no compositions, it depends upon custom, which limits the exercise, altho' it cannot deprive the bishop of his diocesan right. *1 Still. Eccl. cas. 241, 242.*

And besides that authority which deans and chapters have within their own bodies, they have sometimes an ecclesiastical jurisdiction in several neighbouring parishes, and deanries; and this ecclesiastical jurisdiction is executed by their officials. And they have also temporal jurisdiction in several manors belonging to them, as well as bishops, where their stewards keep courts. *Johns. 56. Word, b. 1. c. 3.*

Making of
statutes.

5. A statute made by dean and chapter to bind their successors, and not themselves, is void, and so declared by the canon law; forasmuch as it is not equirable that a man should lay that burden upon another, which he will not bear himself.

Grants made to
them.

6. It seemeth that at the common law, by the gift or grant of lands to the dean and chapter, as a corporation aggregate, the inheritance or fee simple may pass to them without the word *successors*; because in construction of law, such body politick is said never to die. *God. 58.*

How far they
are guardians of
the spiritualties.

7. The dean and chapter of common right are guardians of the spiritualties of the bishoprick during the vacation, altho' the archbishop now usually hath that right by prescription or composition: but when the archbishoprick is vacant, the dean and chapter of the archiepiscopal see are guardians of the spiritualties throughout the province. *God. 55.*

Presentation of
one of their
own body to a
benefice.

8. Dr. Watson says, if a corporation do present their head, as if the dean and chapter do present the dean to a benefice, it is void; but if they present one of their prebendaries, it is good. *Watf. c. 20.*

Whether the
surrender of
their lands doth
dissolve the cor-
poration,

9. The surrender of the lands and possessions of a dean and chapter, doth not dissolve the corporation. This was declared in the case of the dean and chapter of *Norwich*, who having conveyed their lands to king Edward the sixth, and being incorporated anew, and their lands re-granted, made a lease by their old name; and it was adjudged to be a good lease, because notwithstanding the said

said conveyance of the lands, the old corporation of king Henry the eighth remained. The reason of which was, that the two principal ends, for which deans and chapters were instituted (the first to advise the bishop in spiritualties, the second to restrain him in temporalties) might well be answered by them, though they had no temporal possessions. *Gibf. 173. 4. 3 Co. 73.*

In like manner, if the corps of a prebend is a manor, and no more, if the manor is recovered from him by title paramount, notwithstanding such recovery the person remains a prebendary of the church, because he hath a stall in the choir, and a voice in the chapter. *3 Co. 75.*

10. There have been many disputes concerning the deans and chapters of the new foundation; which altho' agitated sometimes in the courts at Westminster, do not appear as yet to have received a full and final determination, particularly with regard to the validity of their local statutes; and then (supposing their validity), with regard also to the construction of those statutes themselves in divers instances.

Deans and chapters of the new foundation.

In order to obtain a distinct knowledge whereof, it will be necessary to investigate the history of this matter, throughout the following periods of time; namely, from the first erection of the said deanries and chapters, in pursuance of the act of the 31 H. 8. to the first year of the reign of queen Mary; from the first year of queen Mary, to the first year of queen Elizabeth; from the first year of queen Elizabeth to the sixth year of queen Anne, and from the sixth year of queen Anne, to the present time.

(1) By the 31 H. 8. c. 9. power of foundation and erection is given to the king as followeth: *Forasmuch as it is not unknown, the slothful and ungodly life which hath been used among all those sorts which have borne the name of religious folk, and to the intent that from henceforth many of them might be turned to better use, as hereafter shall follow, whereby God's word might be the better set forth, children brought up in learning, clerks nourished in the universities, old servants decayed to have livings, alms houses of poor folk to be sustained in, readers of greek hebrew and latin to have good stipend, daily alms to be ministered, mending of highways, exhibition for ministers of the church; it is thought therefore unto the king's highness most expedient and necessary, that more bishopricks, collegial and cathedral churches shall be established instead of these afore-said religious houses, within the foundation whereof these other titles afore rehearsed shall be established: it is therefore enacted, that the king shall have power to declare and nominate by his let-*

Deans and chapters:

ters patents, or other writings to be made under his great seal, such number of bishops, such number of cities (sees for bishops), cathedral churches and dioceses, by metes and bounds, for the exercise and ministration of their episcopal offices and administration, as shall appertain; and to endow them with such possessions after such manner form and condition, as to him shall be thought necessary and convenient; and also shall have power to make and devise translations, ordinances, rules and statutes, concerning them all and every of them, and further to do every other thing which he shall think requisite for the good perfection and accomplishment of his said most godly and gracious purposes touching the premises, or any other charitable or godly deeds to be devised by him concerning the same; and that all such translations, nominations of bishops, cities, sees, and limitations of dioceses for bishops, erections, establishments, foundations, ordinances, statutes, rules, and all other things which shall be devised and expressed by his sundry and several letters patents, or other writings under his great seal, touching the premises, or any of them, or any circumstances or dependencies thereof, necessary and requisite for the perfection of the premises, shall be as effectual to all intents and purposes, as if done by the authority of parliament.

In pursuance of this power, the king did erect the severall sees, deanries, and churches before mentioned; and in the charters of their foundation, with respect to the matters before us, did ordain as followeth: *Rex omnibus ad quos, &c. salutem. Cum nuper cenobium quoddam seu domus regularium canonicorum, quod, dum extitit, prioratus, seu domus canonicorum regularium beatæ Mariæ virginis Carliolensis vulgo vocabatur, atque omnia et singula ejus maneria, dominia, messuagia, terras, tenementa, hereditamenta, dotationes et possessiones cortis de causis specialibus et urgentibus per Lancolotum ipsius nuper cenobii sive domus canonicorum regularium priorem et ejusdem loci conventum, nobis et hæredibus nostris imperpetuum jam data fuerunt et concessa, prout per ipsorum prioris et conventus cartam sigillo suo communi sive conventus sigillatam, et in cancellaria nostra irrotulatam manifeste liquet:*

Nos — quendam ecclesiam cathedralem, de uno decano presbytero, et quatuor presbyteris præbendariis ibidem, omnipotenti Deo omnino et imperpetuum servituris creari, erigi, fundari et stabiliri decrevimus; et eandem ecclesiam cathedralem, de uno decano presbytero, et quatuor præbendariis presbyteris, cum aliis ministris ad divinum cultum necessariis, tenore præsentium, realiter et ad plenum creamus, erigimus, &c. — Volumus etiam et ordinamus, quod prædicti decanus et quatuor præbendarii, se gerent, exhibebunt, et occupabunt, juxta

et

et secundum ordinationes, regulas, et statuta eis per nos in quadam. *INDENTURA* in posterum fienda, specificanda, et declaranda. — *Et quod præfati decanus et prebendarii ecclesiæ cathedralis prædictæ et successores sui sint, et imperpetuum erunt, capitulum episcopatus Carlisiensis, sitque idem capitulum Roberti nunc Carlisiensis episcopo, et successoribus suis episcopis Carlisiensibus perpetuis futuris temporibus annexum, incorporatum, et unitum.* — *Volumus etiam, et per præsentem concedimus, præfato decano et capitulo dictæ ecclesiæ cathedralis sanctæ et individue Trinitatis Carlisiensis, et successoribus suis, quod decanus ecclesiæ cathedralis illius pro tempore existens, omnes et singulos ejusdem ecclesiæ cathedralis inferiores officarios et ministros, ac alias prædictæ ecclesiæ cathedralis sanctæ et individue Trinitatis Carlisiensis quascunque personas, prout casus seu causa exiget, faciet, constituet, admittet, et acceptabit, de tempore in tempus imperpetuum; et eos et eorum quemlibet sic admissos, vel admissum, ob causam legitimam, corrigere, deponere, et etiam ab eadem ecclesia cathedrali amovere et expellere possit et valeat. Salvis nobis, hæredibus et successoribus nostris, titulo, jure, et auctoritate, decanum, prebendarios, et omnes pauperes, ex liberalitate nostra ibidem habitantes, de tempore in tempus nominandi, assignandi et præficiendi, qualitercunque et quotiescunque ecclesia cathedralis prædicta decano, prebendariis vel pauperibus prædictis, vel eorum aliqui, per mortem, vel aliter vacare contigerit.* — *Teste rege, &c.*

Note, all the other foundation charters are of the like form; but that of Carlisle in particular is here recited, because upon this charter did arise the contests which occasioned the act of the 6 Ann. c. 21. (hereafter following) to be made.

In the mean time, what is to be observed at present is, that by the above recited act of the 31 H. 8. the ordinances, rules, and statutes to be given by the king to the new foundations, were to be under the *great seal*; and by the above recited charter of foundation they were also to be specified in a certain *indenture* by the king then after to be made.

Now the king did, by his commissioners appointed for that purpose, institute ordinances, rules, and statutes for the said new foundations; which were delivered to them signed by the said commissioners, but not under the *great seal*, nor *indented*. And it is recited in the commission afterwards issued by king Philip and queen Mary for revising the said statutes, that they were only given to the several churches by way of trial or probation, as being intended

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afterwards to be perfected and delivered in form under the great seal and indented, if the same had not been prevented by the king's death.

And there seemeth to be some foundation for this surmise; for the statutes do not conclude in the usual form of letters patents under the great seal, but end with the subscription of the commissioners; and in fact some of the statutes were not given until a little before the king's death; as particularly the statutes of the church of Carlisle, which bear date the sixth day of June in the thirty-seventh year of his reign, when the king was very infirm, and he died in the January following.

(2) But, whatever might be the cause, upon this foundation only did these statutes subsist, at the end of the reign of king Henry the eighth, and during the reign of king Edward the sixth.

In the beginning of the next reign, by the act of the 1 Mar. sess. 3. c. 9. it is enacted as followeth: *Whereas the late noble prince of famous memory, king Henry the eighth, father unto our most gracious sovereign lady the queen, amongst other his godly acts and doings, did erect make and establish divers and sundry churches as well cathedral as collegiate, and endued every of the same with divers manors, lands, tenements, and possessions, for the maintenance of the deans, prebendaries, and ministers within the same, and for other charitable acts to be done by the same deans, prebendaries, and ministers; and also did incorporate the same deans, prebendaries, and ministers, and made them bodies politick in perpetual succession, according to the laws of this realm of England; and whereas also the said late king, for the better maintenance and preservation of the said churches in a godly unity and good order and governance, granted unto the several corporations and bodies corporate of every of the said churches, that they should be ruled and governed for ever according to certain ordinances rules and statutes, to be specified in certain indentures then after to be made by his highness, and to be delivered and declared to every of the bodies corporate of the said churches, as by the several erections and foundations of the said churches more plainly it doth and may appear: since which said erections and foundations, the said late king did cause to be delivered to every of the said churches, by certain commissioners by his highness appointed, divers and sundry statutes and ordinances, made and declared by the same commissioners, for the order rule and governance of the said several churches and of the deans prebendaries and ministers of the same; which said statutes and ordinances were made by the said commissioners, and delivered to every of the said corporations of the said several churches*

churches in writing, but not indented according to the form of the said foundations and erections; by reason whereof, the said churches and the severall deans prebendaries and ministers of the same, have no statutes or ordinances of any force or authority, whereby they shall be ruled and governed, and therefore remain as yet not fully established in such sort, as the godly intent of the said late king was; to the great imperfection of the churches, and the hindrance of God's service, and good order and government to be had and continued amongst the ministers of the same: and forasmuch as the authority of making the said statutes ordinances and orders was reserved only to the said king, and no mention made of any like authority to be reserved unto his heirs and successors, the same orders and statutes cannot now be made and provided without authority of parliament—It is therefore enacted, that the queen shall, during her natural life, have power to make and prescribe to every of the said churches and the deans prebendaries and ministers of the same, and to their successors, such statutes ordinances and orders, for the good government rule and order of every of the same churches deans prebendaries and ministers of the same, and of the lands manors tenements and possessions of every of the same churches, as shall seem good to her highness, the same statutes and ordinances to be made by her highness in writing, sealed with the great seal of England, and to be delivered to the deans, prebendaries and ministers of every of the said churches for the time being; and also shall have power, by writing sealed with the great seal of England, to alter transpose change augment or diminish the said orders statutes and ordinances of every of the said churches, as to her shall seem good; and also shall have power to establish statutes ordinances and foundations, for the good order and government of such grammar schools as have been erected founded or established by king Henry the eighth, or king Edward the sixth, and of the masters and scholars of the said schools, and to alter and transpose such other statutes and ordinances there made heretofore, from time to time as to her shall seem most convenient.

In pursuance of this act, king Philip and queen Mary issued their commission to the effect following: Philippus et Maria, reverendis in Christi patribus &c. salutem. Cum illustrissimus princeps et pater noster Henricus octavus collegium sive ecclesiam cathedralem Christi et beatæ Mariæ virginis Dunelmensis erexit et instituit, ac eandem ad ministrorum ejus sustentationem præciis aliisque preventibus munifice dotavit; nec potuit, ex hac vita discedens, eandem legibus ac statutis conveniendis magnoque sigillo suo Angliæ signatis, firmiter stabilire: Idcirco nos et institutione ac voluntate patris nostri, et decreto senatus nostri (quem parlamentum vocamus) auctoritatem

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ritatem habentes imperfecta absolvendi, et operi ob eodem inchoato fastigium imponendi, vobis potestatem facimus statuta ad eandem ecclesiam cathedralē Dupelmensem preclare regendam, et ministris ejusdem pro tempore experienda et exercenda ante aliquot annos patris nostri nomine tradita, pervidendi, examinandi, mutandi, et pro arbitrio corrigendi, approbandi, plura si opus fuerit addendi, et (si quid ambigui aut obscuri in eisdem inveniat) explanandi atque expediendi, et tandem in eam formam redigendi, quæ ad illius ecclesiæ cathedralis Dunelmensis ministrorumque ejus rectam et quietam moderationem, et ad virtutis et pietatis assiduum exercitium, vestræ prudentiæ maxime necessaria videbitur.

By virtue of which commission, the present statutes of the church of Durham were drawn up and signed; after which Philip and Mary annexed to them this form of confirmation: *Statuta prædicta in hoc volumine contenta, nostra facimus; eisque robur et auctoritatem nostram, quam ex decreto parliamenti anno primo regni nostri edito habemus, impertimur; et magni sigilli nostri appensione confirmamus; ac pro veris et indubitatis ecclesiæ cathedralis Christi et Mariæ virginis Dunelmensis statutis haberi volumus, &c.* Which statutes are the same with the former statutes of king Henry the eighth; save only that the oath of the king's supremacy is left out: so that what the queen intended seems only to have been, to undo what hath been done against the papal supremacy.

Note, in the said act of queen Mary it is only recited, that king Henry the eighth's statutes were not *indented*; but in this commission it is also specified, that they were not under the *great seal*.

And it is observable, in order still the more to invalidate the said statutes of king Henry the eighth, that the very act of 31 *H. 8. c. 9.* which is the foundation of the whole, was after this statute of the 1 *Mar.* expressly and by name repealed, by the act of 1 & 2 *P. & M. c. 8. s. 18.* only with a proviso at *s. 26.* that the foundations nevertheless should continue. But as to the ordinances rules and statutes by which they should be governed, this entirely then rested upon the power given to the queen by the aforesaid act of the 1 *Mar. sess. 2. c. 9.* But it doth not appear that she gave statutes to any but the church of Durham aforesaid. In the last year of her reign, we find this direction given by cardinal Pole, archbishop, at the opening of the convocation, *Deinde voluit reverendissimus statuta ecclesiarum noviter erectarum aut mutatarum a regularibus ad seculares, expendi per episcopos Lincolnensem,*

Cicestrictensem, &c. et quæ consideranda sunt, referri reverentissimo quam primum commode poterunt. But the queen died, and nothing further was done.

(3) Upon queen Elizabeth's accession, the like power was given to her during her natural life, by the act of 1 *Eliz. c. 22.* (which act was not printed until the year 1707, when the disputes happened that caused the act of 6 *An. c. 21.* to be made.) By which act of 1 *Eliz. c. 22.* it is enacted as followeth; *Forasmuch as certain cathedral and collegiate churches, and other ecclesiastical corporations, and some schools have been erected founded or ordained by king Henry the eighth, king Edward the sixth, queen Mary, and by the late cardinal Pole, not having as yet established such good orders rules and constitutions, as should be meet and convenient for the good order safety and continuance of the same: It is enacted, that the queen, during her life, shall have power to make and prescribe to every of the said churches incorporations and schools, and to all and every the officers ministers and scholars therein, and to their successors for ever, such statutes ordinances and orders, as well for the good use and governance of themselves being officers ministers or scholars, and for the order of their service ministry functions and duties, as also for their houses lands tenements revenues and hereditaments with the appurtenances; and to alter or change, augment or diminish the same, from time to time, as to her shall seem expedient: and the said churches incorporations and schools, and every person therein, for which the queen shall make any statutes ordinances or orders, or alter change diminish or augment the same, and set forth the same under the great seal of England, shall keep and observe all the same statutes orders and ordinances, any former rules laws or constitutions in any wise notwithstanding; and the same so made ordained and set forth under the great seal, shall be and remain good and effectual to all intents and purposes.*

Pursuant to the power vested in the queen by this act, there seems to have been some sort of confirmation presently made of the statutes of king Henry the eighth, for a rule to the several churches, until they could be reviewed and reformed; for so it plainly was in the church of Peterborough, as appears by bishop Scambler's letter to the queen concerning those statutes: "After this house was erected (says he), there came to the same certain statutes for the government thereof, under his majesty's name, and so have continued, not without regard; the rather through a confirmation made of them by your ma-

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jeſty's viſitors, appointed for that place and countries adjacent, in the firſt year of your moſt happy reign."

Afterwards, ſpecial power for that end having been inſerted in the body of the eccleſiaſtical commiſſion, new ſtatutes were prepared by the archbiſhop and others, and finiſhed in the month of July, 1572; and the ſeveral bodies were ready for the royal confirmation; but this (for what reaſon, or by what accident, appears not) was never obtained.

Three years after that, the like power was inſerted in the eccleſiaſtical commiſſion granted to archbiſhop Grindal and others; which was thus: "Whereas there were divers cathedral and collegiate churches, grammar ſchools, and other eccleſiaſtical corporations, erected founded or ordained by king Henry the eighth, king Edward the ſixth, queen Mary, and the late lord cardinal Pole, the ordinances rules and ſtatutes whereof be either none at all, or altogether imperfect; or, being made at ſuch a time as the crown of this realm was ſubject to the foreign uſurped authority of the ſee of Rome, they be in ſome points contrary diverſe and repugnant to the dignity and prerogative of our crown, the laws of this our realm, and the preſent ſtate of religion within the ſame; we therefore do give full power and authority to you, to cauſe and ordain in our name, all and ſingular the ordinances rules and ſtatutes of all and every the ſaid cathedral and collegiate churches, grammar ſchools, and other eccleſiaſtical corporations, together with their ſeveral letters patents and other writings touching and in any thing concerning their ſeveral erections and foundations, to be brought and exhibited before you; willing and commanding you, upon the exhibiting, and upon diligent and deliberate view ſearch and examination of the ſaid ſtatute rules and ordinances letters patents and writings, not only to make ſpeedy and undelayed certificates of the enormities diſorders defects ſurpluſage or wants, of all and ſingular the ſtatutes rules and ordinances, but alſo with the ſame, to advertiſe us of ſuch good orders and ſtatutes as you ſhall think meet and convenient to be by us made and ſet forth, for the better order and rule of the ſaid ſeveral churches erections and foundations, and the poſſeſſions and revenues of the ſame; and as may beſt tend to the honour of almighty God, the increaſe of virtue and unity in the ſaid places, and the public weal and tranquillity of this our realm; to the intent we may thereupon further proceed,

ceed, to the altering making and establishing of the same and other statutes rules and ordinances, according to an act of parliament thereof made in the first year of our reign."

But nothing appears to have been done in pursuance of those powers: although the inconveniencies and mischiefs of wanting a certain rule appear evidently by the tenor of the aforesaid letter, which was written to the queen by bishop Scambler. The bishop, after a complaint of non-residence and want of discipline, with his own fruitless endeavours to reform what was amiss, adds, "One chief and sole cause in a manner, of all this matter, besides the perverseness of mens natures, being the uncertainty of the authority of the statutes of the said church; the froward and disobedient pretending for their defence, that the same were and are of no force, and that they stand at liberty to do or not to do the premises at their pleasure; because they are not extant under the *great seal* and *indented*." Whereupon his prayer to the queen is, "Let not then, I most humbly beseech you, the matter of government of these houses (for they, all that are of your father's foundation, be in like uncertainty of the authority of their statutes, and especially this church where I am) stand any longer doubtful; but let it be by your most sacred majesty decided and determined, under what rules and orders they shall live."

But nothing further was done in that queen's reign. Whether it was, that she did not like the power by which she acted (for she was always averse from the parliament's interfering in ecclesiastical affairs, and that might be one reason perhaps why the act was not then printed); or whether she had a mind (as appears in divers other instances) to retain the church at that time in a state of dependence upon the crown; or whatever else might be the cause, so it was, that during her long and active reign nothing was effected to render these foundations more established and secure.

However, thus much is certain; that notwithstanding the recital in the act of the 1 Mar. abovementioned, that such ordinances rules and orders *could not be made without authority of parliament*; the princes of this realm in those days did not think themselves under that restraint; and accordingly king Charles the first, and king Charles the second, of their own royal authority, did give statutes to several of those churches without any parliamentary sanction to support them.

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But still the doubt remained, for the reasons abovementioned, how far any of these statutes were in force.

(4) And particularly, about the year 1706, Dr. Atterbury then dean of Carlisle, resting solely upon the foundation charter, which (as before expressed) gives unto the dean a power of appointing, ordering, and removing all and every the inferior officers and ministers of the church; *and other persons whatsoever* of the said church, extended this clause so far, as to take upon himself the sole appointment ordering and removing of all persons whatsoever any way concerned in the government and revenue of the said church; rejecting at the same time the authority of the local statutes, which limit that general power, and expressly define what officers and ministers only in the said charter are intended.

About the same time, Dr. Todd one of the prebendaries of the said church, strenuously opposed the visitation of the chapter by Dr. Nicholson then bishop; insisting, that the statutes of king Henry the eighth, by which only the bishop is appointed local visitor, were of no force; and consequently, that this being a royal foundation, the power of visitation was in the crown. Upon which Dr. Todd was excommunicated by the bishop; and the proceedings were removed into the court of king's bench. In the mean time this dispute involving in it most of the churches of the new foundation, not only upon the aforesaid account of the uncertain authority of their respective local statutes, but also in regard that the originals of the said statutes in some places were perished by length of time, or lost, or destroyed in the great rebellion; therefore, that this matter might finally be at rest, the act of the 6 *An. c. 21.* was made; by which it was thus enacted: *Whereas several doubts and questions have arisen, and may hereafter arise, in relation to the validity and force of the statutes of divers cathedral and collegiate churches, founded by king Henry the eighth; which doubts and questions have been occasioned, partly by a temporary act of parliament made in the first year of the reign of queen Mary in relation to the said statutes, and in order to defeat the true and pious ends and designs of the said foundations, and partly by reason of the known loss of many records and evidences during the late rebellion in this kingdom; and whereas the said doubts and disputes may in time not only turn to the great disquiet and prejudice of the said foundations, but may prove a manifest obstruction to the peace, order, good government and discipline of the church, unless some speedy and effectual remedy be provided; it is therefore enacted,*

ed, that in all cathedral and collegiate churches founded by the said king Henry the eighth, such statutes as have been usually received and practised in the government of the same respectively, since the late happy restoration of king Charles the second, and to the observance whereof the deans and prebendaries, and other members of the said churches, from the said time have used to be sworn at their instalments or admissions, shall be and shall be taken and adjudged to be good and valid in law, and shall be and be taken and adjudged to be the statutes of the said churches respectively; nevertheless, so far forth only, as the same or any of them are in no manner repugnant to, or inconsistent with the constitution of the church of England as the same is now by law established, or the laws of the land—Provided, that it shall be lawful for her majesty, during her life, from time to time to alter, amend, correct, revoke, diminish, or enlarge the said statutes, or any of them; and to make new statutes and ordinances for the said cathedral and collegiate churches, and for resuming or settling the local visitation of them, or any of them; in such manner, from time to time, as to her majesty shall seem meet.

By this act the former disputes were at an end; the local statutes being hereby generally established and confirmed. But hereupon divers questions have arisen: as, first of all, Under what restrictions this act is to be understood; or, what those statutes are which are hereby confirmed, and what statutes are not hereby confirmed? And the restrictions are three: 1. Such statutes only are confirmed, as were usually received and practised in the respective churches, from the time of the restoration to the time of making the act. 2. And such only, to the observance whereof the deans and prebendaries and other members of the said churches from the said time had used to be sworn at their instalments or admissions. And, 3. So far forth only, as the same statutes or any of them are in no manner repugnant to or inconsistent with the constitution of the church of England, or the laws of the land.

Now one great doubt hath been, Whether by the words [*such statutes*] in the first restriction, are meant *bodies* of statutes generally received and practised since the restoration; or only, *particular* statutes within such bodies, as had been received. In the former case, if the whole *bodies* of statutes are intended, then the several particulars therein are confirmed, although perhaps some of those particulars had not been practised since the restoration; provided such particulars are not contrary to the constitution of the church

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church or laws of the realm. In the latter case, if *particular* statutes are only intended, then to know whether any such particular statute is in force, it will be necessary to be informed whether it was generally received and practised during the aforetaid time. The former opinion seemeth generally to prevail. An instance will render this plain. The charters of foundation do require, that the deanries shall be donative, and conferred by the king's letters patents: but the local statutes (for it is to be observed, that the statutes of the several churches are in many respects the same) do require that the dean shall be presented by the crown, and instituted by the bishop; and the particular statute which enjoins this, had not in several of the churches been usually practised since the reformation. And particularly with regard to the church of Gloucester, in the year 1720, the case was stated by the crown to the then attorney and solicitor general, who delivered their opinion according to the following weighty and very judicious report :

Whitehall, 23d May, 1720.

Gentlemen,

The deanry of Gloucester being become vacant, the bishop of that see apprehends, that by an act of parliament in the sixth year of the late queen Anne, a new sanction is given to the body of statutes of that cathedral; and that those statutes require, that contrary to the practice of above a hundred years, the dean thereof ought to come in by presentation, and receive institution from him. I herewith send you several copies of records and other papers; which will more fully apprize you of this matter. And I am to signify to you his majesty's pleasure, that you consider of it, and report your opinion, whether the ancient method should take place or a new one be introduced; and that if you think the practice ought to be altered, you do in that case prepare a form of such an instrument as you shall think proper to pass under the great seal for that purpose. I am, &c.

Stanhope.

To his majesty's attorney
and solicitor general.

To their excellencies the lords justices.

May it please your excellencies :

In humble obedience to his majesty's commands, signified to us by letter from the right honourable the earl
Stanhope,

Stanhope, &c. whereby we are informed, that the deanry &c. (as above) — We have considered of the matters thereby to us referred, and do most humbly certify your excellencies, That the deanry of Gloucester was erected by letters patents bearing date 7th Sept. 23 H. 8. whereby the king appoints the first dean and prebendaries, and in ordering the precedence of the dean, directs, *quod ipse decanus, et quilibet ejus successorum, per nos nominandi, shall be next in dignity to the bishop.* Then the charter appoints, that the dean and prebendaries shall be a body corporate, and have perpetual succession; *et se gerent, exhibebunt, et occupabunt, secundum ordinationes regulas et statuta, eis per nos in quadam indentura impoſitorum fienda, ſpecificanda, et declaranda.* The king further grants them divers privileges: after which follows a ſaving claufe in theſe words: *Salvis, nobis hæredibus et ſucceſſoribus noſtris, titulo jure et authoritate decanos prebendarios et omnes pauperes ex liberalitate noſtra ibidem viventis de tempore in tempus nominandi, assignandi, et præficiendi, qualitercunque et quotieſcunque eccleſia cathedralis prædicta de decano præbendariis vel pauperibus prædictis vel eorum, aliquo per mortem vel aliter vacare contigerit per literas noſtras patentes de tempore in tempus ordinare præficere et præſentare.*

Theſe are all the claufes in the letters patents of foundation, which concern the manner in which future deans were to come in; and we humbly apprehend, that if the queſtion had reſted ſingly upon the charter, this deanry muſt have been taken to be donative in the crown: for though the word *præſentare* is uſed in the laſt claufe, yet we apprehend, that it is not to be underſtood of a proper preſentation to the biſhop, becauſe it is brought in only in a ſaving claufe, and that ſenſe ſeems inconſiſtent with the other words with which it ſtands coupled, which import a complete appointment by the crown.

The caſe ſtanding thus upon the charter of foundation, we further humbly certify your excellencies, that as there is a claufe in the charter referring to future ſtatutes to be given by the king, ſo it appears to us, that king Henry the eighth, in the 36th year of his reign, did give a body of ſtatutes for the better rule and government of the cathedral church of Glouceſter; which, however invalid in the original, have in general been eſteemed and obſerved as the ſtatutes of that church ever ſince. The ſecond chapter of thoſe ſtatutes, intituled, “ Of the qualification of the dean,” of which an Engliſh tranſlation only hath been laid before us, has theſe words: *Whenſoever the*

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the office of dean shall hereafter become void, by death resignation deprivation or cession or by any other means; we will that such person shall be dean, and be so accepted, and enjoy the office of dean in all respects, whom we or our successors shall nominate elect and prefer by our letters patents to be sealed under the great seal of us or our successors, and shall think fit to present to the bishop of Gloucester; which said dean so nominated elected and presented, and having been instituted by the bishop, the canons for the time being shall accept and admit for dean of the cathedral church of Gloucester; and the dean upon such his admission, before he shall take upon him any government in the church, or concern himself in any affairs thereunto belonging, shall take an oath in this form, viz. "I N. who am elected and instituted dean of this cathedral church, do call God to witness, &c."

The expressions in this statute are somewhat particular and uncommon; but upon the whole, we apprehend, that in case the said statute had been regularly given pursuant to the power reserved by the charter, it would have made a presentation to the bishop necessary in this case, and the dean ought to have received institution from him. But it appears, that the body of statutes, of which this is one, was not given by indenture, which is the only form the charter prescribes; and we find that by an act of parliament made in the 1 Mar. the statutes given by king Henry the eighth to the cathedral churches founded by him are recited to be void.

For these reasons we are humbly of opinion, that this statute was not valid in its original, had no operation to alter the charter, and consequently that the dean ought then to have come in by donation notwithstanding the statutes.

We farther humbly certify your excellencies, that several copies of instruments under the great seal for constituting deans of Gloucester from time to time, have been transmitted to us; which we have perused and hereto annexed, and find none of them to be in the strict form of a presentation.

The only precedent which looks that way, is that of dean Cooper in the 11 Eliz. which is directed to the bishop of Gloucester, and has in it the word *presentamus*, and requires the bishop to institute him. But it contains also an express grant of the deanry to Cooper; and we beg leave to observe to your excellencies upon this precedent, that it seems framed in conformity to the statute before-

fore-mentioned about the qualification of the dean, having pursued it in the very words and expressions.

All the other precedents transmitted to us besides that of Cooper, as well before as since the restoration, we conceive to be mere grants from the crown.

This was the state of the case at the time the statute 6 *An.* intitled, *An act for avoiding doubts and questions touching the statutes of divers cathedral and collegiate churches*, was made: And the body of statutes given by king Henry the eighth being (as hath been already observed) originally void, and this deanry (as appears by the precedents) having passed by grant from time to time; we apprehend the single question to be, Whether this act of parliament has given such a sanction to the statute about the qualification of the dean, as to alter the practice of granting which has hitherto prevailed, and make a presentation to the bishop necessary?

We beg leave to observe to your excellencies, that as far as we can be informed, this is the first question that hath arisen upon this act; and that, upon consideration of the act, it appears to be drawn in a loose and doubtful manner, and may admit of various constructions.

The preamble takes notice, that several doubts had arisen, concerning the validity of the statutes of divers cathedral and collegiate churches founded by king Henry the eighth; which had been occasioned partly by an act of the 1 *Mar.* and partly by reason of the loss of records during the rebellion, which might prove an obstruction to the good government and discipline of the church: and then it enacts, that in all cathedral and collegiate churches founded by the said king Henry the eighth, such statutes as have been usually received and practised in the government of the same respectively since the restoration, and to the observance whereof the deans and prebendaries and other members of the said churches from the said time have used to be sworn at their instalments or admissions, shall be and be taken and adjudged to be the statutes of the said churches respectively; nevertheless, so far forth only as the same or any of them are in no manner repugnant to or inconsistent with the constitution of the church of England as it is now by law established, or the laws of the land.

The question arising upon this act, material to the point referred to us, is whether by the words — *Such statutes as have been usually received and practised since the restoration* — be intended, bodies of the statutes, particular

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lar statutes within which bodies have been generally acted under as occasion required; or only, such particular individual statutes as have been actually put in practice? for if this act only confirmed such particular statutes as have been actually practised; then it is clear, that this statute about the qualification of the dean is not confirmed, nor has any greater force than it had originally; there being no pretence of any practice under it since the restoration. But if the act has confirmed bodies of statutes, particular statutes within which bodies have been generally acted under; then this statute will be in consequence confirmed, notwithstanding it has not been in fact specially observed.

We apprehend this to be a question of great doubt and difficulty: but upon consideration of the several parts of the act, we are humbly of opinion, that bodies of statutes, particular statutes in which have been generally acted under as occasion has required since the restoration, are thereby confirmed; for these reasons:

In the first place, the doubts and questions, which are recited in the preamble to have arisen, were not concerning any particular individual statutes, but concerning the bodies of statutes given by king Henry the eighth, whether they were given in a proper manner; and the reason for which they were declared void by the act of 1 Mar. went to the whole body of statutes, and not to particular branches; and it seems reasonable, that the same expression should have the same signification in the enacting clause, as in the preamble.

Besides, the act does not only confirm such statutes as have been usually received and practised since the restoration, but makes a further description, viz. *And to the observance wherof the deans and prebendaries from the said time have used to be sworn at their instalments*: and it is well known, that the members of cathedral churches are never sworn to the observance of particular statutes, but of bodies of statutes in general.

The restrictive clause at the end is likewise observable to this purpose; *Nevertheless, so far forth only, as the same or any of them are in no manner repugnant to or inconsistent with the constitution of the church of England as it is now by law established, or the laws of the land*. Hereupon we humbly conceive, that the legislators could not apprehend, that any particular statutes, inconsistent with the constitution of the church or the laws of the land, had been usually received and practised since the restoration; but that

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III

that restriction seems aimed at some parts of the bodies of those statutes, which might possibly relate to popish superstition, and therefore were not fit to be confirmed with the rest.

Upon the whole, we are humbly of opinion, that the abovementioned statute about the qualification of the dean has received a confirmation by this act of parliament, as part of the body of statutes of this church; and consequently, that in the case of this particular deanry a presentation to the bishop, according to the terms of that statute is now become necessary. And we have, in humble obedience to his majesty's commands, prepared the form of an instrument (hereto annexed), which we humbly submit to your excellencies, as proper to pass the great seal for that purpose; wherein we have also inserted a clause of grant, and exactly followed the precedent of dean Cooper; that seeming to us to have been settled with great care in pursuance of the statute. All which, &c.

R. RAYMOND.
P. YORK.

11 July, 1720.

Again: supposing the whole bodies of statutes to be confirmed, so far as the same statutes or any of them are not contrary to the constitution of the church or laws of the land; questions have arisen concerning the construction of those statutes themselves. As particularly, how far the clause in those local statutes, which gives power to the dean or in his absence to the vicedean and chapter to chuse the minor canons, lay clerks, and other officers therein particularly specified, shall be understood to qualify the general power given by the charter of foundation to the dean to appoint all and every the inferior officers and ministers.

Thus in the church of Bristol, in the year 1751, a dispute of this kind arising, the same was referred to the then bishops of London, St. David's and St. Asaph; whose determination was as follows:—Whereas differences and disputes having arisen, between the reverend Dr. Chamberlayne, dean of the cathedral church of Bristol, and the chapter of the said church, touching the right of naming the precentor, minor canons, grammar schoolmaster, lay-clerks, or singing-men, choiristers, subsacrist, or sexton of the said church, They the said dean and chapter did, by an act of chapter, dated the 19th of August, 1751, submit the said dispute to the arbitration and determination of

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the lords bishops of London, St. David's, and Norwich, in case he should be able to attend; if not the lord bishop of St. Asaph: and whereas the lord bishop of Norwich has, by reason of his constant attendance on the prince of Wales and prince Edward, declined the said arbitration, We the said bishops of London, St. David's, and St. Asaph, have accepted and do hereby accept of the said reference and arbitration, in virtue of the aforesaid act of chapter, and also of two subsequent acts of chapter bearing date the 30th of November, 1751, and the 2d of March, 1752, as by the said acts (relation being thereunto had) may more fully appear. And we the said arbitrators, having considered the case laid before us, by the dean of Bristol of the one part, and the prebendaries on the other, and also the papers and documents delivered on each side, in support of their respective claims, particularly and especially the charter of foundation of Hen. 8. bearing date June 4, in the 34th year of his reign, and also the body of statutes given by his commissioners to the said dean and chapter, bearing date the 5th of July, in the 36th year of his reign, are of opinion, and do determine, that the right of naming the precentor, minor canons, grammar schoolmaster, lay-clerks or singing-men, choiristers, sub-sacrist or sexton of the cathedral church of Bristol, is in the dean and chapter, and the dean being absent, in the vice-dean and chapter of the said church. In witness whereof, we have hereunto set our hands and seals, this 23d day of March, 1752.

Tho. London (Sherlock).

Ri. St. David's (Trevor).

R. St. Asaph (Drummond).

Thus also in the year 1764, a like dispute arising in the cathedral church of Gloucester, the same was determined upon reference as follows:—Whereas disputes and differences have arisen, between the reverend Dan. Newcome, D. D. dean of the cathedral church of Gloucester, and Joseph Atwell, D. D. and Sam. Wolley, M. A. two of the prebendaries of the said church, concerning the right of electing and removing the precentor, minor canons, sacrist, subsacrist, schoolmaster, usher, organist, lay-clerks, and choiristers of the said church, they the said deans and prebendaries did enter mutually into bonds dated Oct. 14, 1754, to abide by the arbitration and award of such person or persons as should be in that behalf nominated and appointed arbitrators by the right reverend the lord bishop of

of

of Gloucester, on or before the 30th of November then next, so as the award of such arbitrators be made in writing ready to be delivered on or before Nov. 30, 1755. And whereas the said bishop did, in pursuance thereof, by writing dated the third day of November 1754, nominate and appoint us the underwritten to award and determine the said disputes and differences, Now we the said arbitrators, having duly considered the cases laid before us by the dean of Gloucester of the one part, and the said prebendaries on the other, and also the papers delivered in support of their several claims, particularly the charter of foundation of Hen. 8. bearing date Sept. 4. in the 33d year of his reign, and also the body of statutes given by his commissioners to the said dean and prebendaries, bearing date Jul. 5. in the 36th year of his reign, are of opinion and do determine, that the right of electing and removing of the precentors, minor canons, sacrist, sub-sacrist, schoolmasters, ushers, organists, lay-clerks, and choiristers of the church of Gloucester, is in the dean and chapter, and the dean being absent, in the vicedean and chapter of the said church. In witness whereof we do hereunto set our hands and seals, this 16th day of Oct. 1755.

Tho. Cant. (Herring).

Tho. Clerk (Master of the Rolls).

Geo. Lee (Dean of the Arches).

In like manner, there have been several disputes betwixt the deans on the one hand, and the prebendaries on the other, concerning a negative power which the deans have claimed by virtue of the said statutes in divers instances. As in the aforesaid church of Gloucester, about the year 1752, the dean refused to affix the chapter seal to a lease agreed upon by the majority of the chapter; insisting, that by the local statutes his consent was absolutely necessary to the validity of such lease, which consent he would not give. But the dean submitted before it came to a judicial determination.

In the years 1752 and 1753, a like dispute happened in the cathedral church of Carlisle, about the dean's negative power in conferring of benefices.—The four prebendaries of which the chapter consisteth, one of whom is always vicedean, unanimously elected and nominated under the chapter seal Mr. Henry Richardson, to the perpetual curacy of St. Cuthbert's, Carlisle. The dean entered a caveat against his admission; and the bishop refused to ad-

mit and license him. Whereupon it was moved in the court of king's bench, for a mandamus to the bishop to admit and license the curate.

On shewing cause, it was insisted on behalf of the dean, that by the local statutes the dean's consent is necessary, and consequently, that without this the nomination is not good. The clauses in the statutes respecting this point are these four :

In chap. 5. De officio decani. — *Statuimus etiam et volumus, in omnibus causis gravissimis, veluti in sedis concessione, terrarum et firmarum dimissione, ac beneficiorum collatione, aliisque id genus rebus, decani (si præses sit) consensus obtineatur, sin absens fuerit (modo intra regni nostri Angliæ limites degat) consensus ejus requiratur.*

In Chap. 6. De visitatione terrarum. — *Porro, quoniam crebra capituli mentio in iis statutis habetur; sub capituli nomine ubique intelligimus mediam ad minus partem totius numeri omnium canonicorum: Ea enim scia tanquam per capitulum recta haberi volumus, quibus media ad minus pars totius numeri omnium canonicorum simul præses aut, et ex parte eidem consentiat: Nam absentium canonicorum suffragium (si quid ferre voluerint) nullo modo valere sinimus, nec aliusque reboris esse.*

In Chap. 7. De dimissione terrarum ad firmam. — *Præterea volumus, et nec decanus nec canonicorum ullus terras aut tenementa ulli locet aut ad firmam dimittat, sine consilio et consensu capituli. — Sacristia vero, id est, vicariam, vicariam, aut alia ejus generis ecclesiastica beneficia, ad collationem ecclesiæ nostræ spectantia, decanus cum capitulo, aut (absente decano) vicedecanus cum capitulo conferendi aut episcopo præsentandi jus et potestatem habeant.*

In Chap. 18. De officio vicedecani. — *Statuimus et volumus, ut vicedecanus qui pro tempore fuerit canonicis et omnibus ministris ecclesiæ nostræ (decano absente, vel decanum vacante) præsit et propiciat, eo que in ordine continueat; et quæcumque fieri deberent per decanum præsentem, quæ ad ecclesiæ negotia et regimen pertinent, ipso absente aut ipsius officio vacante, bene et facilius faciat et ministret.*

For the dean it was urged, that by the 5th statute abovementioned, his consent, if he is present, must personally be obtained; and if he is absent, provided he be within the kingdom, his consent nevertheless is required.

To which it was answered, that the 7th statute explains this fully; whereby it appeareth, that the dean and chapter if the dean is present, and if he is absent, the vicedean and chapter shall nominate and present.

It was further insisted on behalf of the dean, that the bishop is visitor by the local statutes, and thereby is appointed the expounder and interpreter of the said statutes when any doubt shall arise. But this objection was overruled: partly, as it seemeth, because Mr. Richardson was no member of the chapter or body corporate subject to the bishop's local visitation, and having by his nomination obtained a temporal right, was therefore properly before the court, to have that right asserted; and partly, perhaps, because this matter of visitation was not then before the court, but would come in regularly upon the bishop's return to the mandamus, if he should so think fit thereupon to return himself visitor; and perhaps partly because this negative power, if given to the dean by the local statutes, might be deemed by the court to be contrary to the law of the land. And the rule for a mandamus was made absolute: setting forth, that whereas Henry Richardson, clerk, had been nominated to the said curacy, and had applied to the bishop to admit and license him, and that the bishop had refused so to do, in contempt of the king, and to the damage and grievance of the said Henry Richardson, *and to the manifest prejudice of his estate*; therefore the bishop is commanded (in the usual form) to admit and license him, or shew cause to the contrary (1).

The bishop upon the mandamus admitted and licensed the curate; so that the whole cause upon the merits came not to be determined. If the dean had appealed to the bishop as visitor, and the bishop had determined for the dean's negative power; or if the bishop had returned himself visitor upon the mandamus, and thereupon had proceeded to visit and determine as aforesaid; then upon a prohibition it would have come to be considered, how far these local statutes in this particular are consistent with the laws of the land, according to the third restriction in the statute of the 6 An. before recited.

(5) And this introduces the act of the 33 H. 8. c. 27. *Election by majority*. which is as follows: *Albeit that by the common laws of this jority. realm of England, all assents elections grants and leases, had made and granted, by the dean warden provost master president or other governor of any cathedral church hospital college or other corporation, with the assent and consent of the more or*

(1) See *Curates*, 4 and 10, in the notes.

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greater part of their chapter fellows or brethren of such corporation having voices of assent thereto, be as good and effectual in the law to the grantees and lessees of the same, as if the residue or the whole number of such chapter fellows and brethren of such corporation, having voices of assent, had therunto consented and agreed; yet the said common laws notwithstanding, divers founders of such deaneries hospitals colleges and corporations within the said realm, have upon the foundation and establishment of the same deaneries hospitals colleges and other corporations, established and made (amongst other their peculiar acts) local statutes and ordinances that if any one of such corporation, having power or authority to assent or dissent, should and would deny any such grant or grants, that then no such lease election or grant should be had granted or leased; and for the performance of the same, every person having power of assent to the same, have been and be daily thereto sworn, and so the residue may not proceed to the perfection of such elections grants and leases, according to the course of the common laws of this realm, unless they should incur the danger of perjury: for the avoiding whereof, and for the due execution of the common law universally within this realm, and every place in one conformity of reason to be used, it is enacted, that all and every peculiar act order rule and statute, heretofore made, or hereafter to be made, by any founder of any hospital college deanery or other corporation, at or upon the foundation of any such hospital college deanery or corporation, whereby the grant lease gift or election of the governor or ruler of such hospital college deanery or other corporation, with the assent of the more part of such of the same hospital college deanery or corporation as have or shall have voice or assent to the same, at the time of such grant lease gift or election hereafter to be made, should be in any wise hindered or let by any one or more, being the lesser number of such corporation, contrary to the form order and course of the common law of this realm of England, shall be from henceforth clearly frustrate void and of none effect; and that all oaths heretofore taken by any person of such hospital college deanery and other corporation, shall be, for and concerning the observance of any such order statute or rule, deemed void and of none effect; and that from henceforth no manner of person or persons of any such hospital college deanery or other corporation, shall be in any wise compelled to take an oath for the observing of any such order statute or rule; on pain of every person giving such oath, to forfeit for every time so offending the sum of 5l. half to the king, and half to him that will sue for the same in any of the king's courts of record.

The

The act seemeth to be expressed in terms somewhat inaccurate and confused; but the manifest intention is, to establish the rule of the common law, that a majority of the body corporate should bind the rest. In some parts of the act the dean seemeth to be contradistinguished from the chapter; so as that the negative of the inferior number of the chapter only, exclusive of the dean, was hereby intended to be taken away; but the other parts of the act seem to explain this; expressing, that *all local statutes, whereby the grant lease or election of such corporation should be any wise hindred by any one or more, being the lesser number of such corporation, contrary to the course of the common law, shall be void.* And it is certain, the dean is one and but one member of the body corporate.

Unto all which may be added, that the rule for the necessity of a majority of the whole body to be consenting, is not only agreeable to the common law and (as it seemeth) to the declaration of the said statute of the 33 H. 8. but also to the ancient canon law, which clearly determineth, that elections shall be made by the *major et senior pars*, that is, by a majority of legal votes (as is before set forth at large under the title *Cathedrals*) (u).

(u) A majority of the chapter is necessary to constitute a valid election, but the court of king's bench will grant a mandamus to compel an election at the peril of those who resist, and perhaps the bishop by ecclesiastical censures may also compel them to do their duty, but he cannot by his ordinary or visitatorial power fill up a vacancy which the chapter has not filled up in due time. *Harward and Webber v. the Bishop of Chichester* in prohibition, 1 T. Rep. 650. And the court doubted whether the bishop could in the case of such a vacancy make a temporary appointment. *Per Buller J.* many points have been decided by this court on great deliberation. It has been resolved, 1. That a mandamus will lie to compel the dean and chapter to fill up a vacancy among the canons residentiary; and on such a mandamus the court will compel an election at the peril of those who resist. 2. That the election is in the dean and canons. 3. That the dean has no casting voice. 4. That the canons have a right to vote by proxy. 5. That there is no lapse to the bishop in the case of a canonry. *Ib.* See more on elections, *Cathedrals*, 6. and *Hospitals*, 4.

V. Of *deans of peculiar*.

Deans without jurisdiction.

1. The word dean is also applied to divers that are the chief of certain peculiar churches or chapels; as the dean of his majesty's chapel royal, and the dean of the chapel of St. George at Windsor; not being the heads of any collegiate body, nor endow'd with any jurisdiction, but only dignified and honoured with the name and title. *Gal. 52-54*

Without chapters.

2. And as there are some deans without jurisdiction, so there are also some deans with jurisdiction, but without any chapter; as the dean of Croston in Surrey, the dean of Battle in Sussex, the dean at Bocking in Essex, and many others. *Gal. 52*

Dean of Battle.

3. Also the bishop of Chichester doth admit the dean of the exempt jurisdiction of Battle within that diocese, and doth commit to him the cure and jurisdiction of that church; yet the patron thereof is to *institute* and *dedicate* him, and the patron accordingly have given the dean institution and induction for some hundreds of years, and without question such institution and induction is good: but this custody was originally given to the incumbents as a faculty only by the patron, and the bishop admits or approves of the patron's presentation, and commits to him the cure and jurisdiction, by compulsion only. *Wals. c. 15.*

Dean of the Arches.

4. The dean of the *Arches* is the judge of the court of Arches, so called of *Archæ* in London, by reason of the temple thereof raised at the top with three pillars in fashion like a *bra bent archæ*; in which church this court was ever wont to be held, being the chief and most ancient court and consistory of the jurisdiction of the archbishop of Canterbury; which parish of Bow, together with twelve others in London, whereof Bow is the chief, are within the peculiar jurisdiction of the said archbishop in spiritual causes, and exempted out of the bishop of London's jurisdiction. *Gal. 100.*

And it is supposed that he was originally styled dean of this court, by reason of his substitution to the archbishop's official, when he was employed abroad in foreign embassies; whereby both these names or styles became at last in common understanding, as it were synonymous. *Gal. 102.*

5. There

5. There is also a deanry of St. Martin le grand in ^{Dean of St. Martin's.} London, concerning which Lindwood puts the question, whether it be such an ecclesiastical benefice as that the incumbent thereof may incur such penalties, as other persons beneficed may incur. And after deep inquiries into the laws precedents and antiquities foreign and domestic, with delectable variety of great learning on both sides argumentatively and impartially, at last doth conclude it in the affirmative. *God. 53. (x).*

6. It is said, that after the death of the dean of a free ^{Profits during vacation.} chapel belonging to the king, the king shall have the profits of the deanry; for it is at his pleasure, whether he will collate a new dean to it. *God. 52.*

But, otherwise, by the statute of the 28 *H. 8. c. 11.* the profits of all spiritual promotions benefices dignities or offices, inferior to those of archbishops and bishops, shall go to the successor, towards the payment of his first fruits.

VI. Of rural deans.

1. The office of rural deans was not unknown to our ^{Antiquity of the office of rural deans.} Saxon ancestors. For in one of the laws ascribed to Edward the confessor, it is provided, that of eight pounds penalty for breach of the king's peace, the king shall have an hundred shillings; the earl of the county fifty shillings; and *the dean of the bishop in whose deanry the peace was broken,* the other ten: which words can be applied only to the office of rural deans, according to the respective districts which they had in the parts of every diocese. *Ken. Par. Ant. 633.*

2. The exercise of jurisdiction in the church by patriarchs, primates, and metropolitans, was instituted in conformity to the like subordinations in the state. *Gibf. 971.* ^{Apportioning the district of rural deans.}

In like manner the dioceses within this realm seem to have been divided into archdeaconries and rural deanries, in order to make them correspond to the like division of the kingdom into counties and hundreds. Hence it came to pass, that the archdeacons, whose courts were to answer to those of the county, had the county usually for their district, and took their titles from the district in which they acted; and the names of the rural deanries

(x) *Lind. 125.*

seem to be taken from the hundreds, and were at first, and generally now are the same. 1 *Warner's Eccl. Hist.* 275.

And as in the state, every hundred was at first divided into ten tythings or friborghs, and every tything was made up of ten families; both which kept their original names, notwithstanding the increase of villages and people: so, in the church, the name of deanry still continued, notwithstanding the increase of persons and churches. And these districts from time to time have been contracted or enlarged at the discretion of the bishop. Tho' some deanries do still retain the primitive allotment of ten churches, especially in Wales, where the most ancient usages do continue. In the diocese of St. Asaph, the deanries of Bromfield and Yale and of Kidwin; in the diocese of Bangor, the deanries of Llin and Llivon; in the diocese of Landaff, the deanry of Usk; in that of St. David's, the deanry of Emlin,——have the precise number of ten parish churches. And several other deanries, that upon their new division were made up of two conjoined, or three contracted into two or one, do now contain the number of fifteen, twenty, or thirty churches, according to the division so made: As for instance, the deanry of Burcester in the diocese of Oxford, is made up of thirty-one parish churches; out of which the church of Ambroiden being excepted (as before the reformation being in the deanry of Cotesdon), the remaining thirty do expressly answer the three distinct deanries of Curtlington, Islip, and Burcester, of which the two former were annexed to the latter. *Ken.* 634. *Gib.* 971.

Appointment of
rural deans.

3. And as in the aforesaid law of king Edward the confessor, the rural dean is there called the *dean of the bishop*, so without doubt he was appointed by the bishop, to have the inspection of clergy and people within the district in which he was incumbent, under him, and him alone; in like manner as the archpresbyter at the episcopal see, was one of the college of presbyters, appointed at the pleasure of the bishop, who in his absence might preside over them, and under him have the chief care of all matters relating to the church. But as in process of time, by the concession of the bishops, the cathedral archpresbyter or dean became elective, and being chosen by the college of presbyters, or the chapter, was only confirmed by the bishop; so after that the archdeacon, by the like concessions, became a sharer in the administration of episcopal jurisdiction, he became of course a sharer in the appointment of rural deans. *Gib.* 971.

4. The

4. The proper authority and jurisdiction of rural deans ^{Their oath of} perhaps may be best understood, from the oath of office ^{office.} which in some dioceses was anciently administered to them; which was this: "I A. B. do swear, diligently and faithfully to execute the office of dean rural within the deanry of D. First I will diligently and faithfully execute, or cause to be executed, all such processes as shall be directed unto me from my lord bishop of B. or his officers or ministers by his authority. Item, I will give diligent attendance, by my self or my deputy, at every consistory court, to be holden by the said reverend father in God, or his chancellor, as well to return such processes as shall be by me or my deputy executed; as also to receive others, then unto me to be directed. Item, I will from time to time, during my said office, diligently inquire, and true information give unto the said reverend father in God, or his chancellor, of all the names of all such persons within the said deanry of D. as shall be openly and publicly noted and defamed, or vehemently suspected of any such crime or offence, as is to be punished or reformed by the authority of the said court. Item, I will diligently inquire, and true information give, of all such persons and their names, as do administer any deadmen's goods, before they have proved the will of the testator, or taken letters of administration of the deceased intestates. Item, I will be obedient to the right reverend father in God J. bishop of B. and his chancellor, in all honest and lawful commands; neither will I attempt, do, or procure to be done or attempted, any thing that shall be prejudicial to his jurisdiction, but will preserve and maintain the same to the uttermost of my power." *God. Append. 6, 7.*

5. From whence it appears, that besides their duty ^{Their holding} concerning the execution of the bishop's processes, their ^{rural chapters.} office was, to inspect the lives and manners of the clergy and people within their district, and to report the same to the bishop: to which end, that they might have knowledge of the state and condition of their respective deanries, they had a power to convene rural chapters. *Gibb. 973.*

Which chapters were made up of all the instituted clergy, or their curates as proxies of them, and the dean as president or prolocutor. These were convened either upon more frequent and ordinary occasions, or at more solemn seasons for the greater and more weighty affairs.

Deans and chapters.

Those of the former sort were held at first every three weeks, in imitation of the courts baron, which run generally in this form, from three weeks to three weeks: but afterwards they were most commonly held once a month, at the beginning of the month, and were for this reason called *kalendæ* or monthly meetings. But their most solemn and principal chapters were assembled once a quarter, in which there was to be a more full house, and matters of great import were to be here alone transacted. All rector and vicars or their chaplains, were bound to attend these chapters, and to bring information of all irregularities committed in their respective parishes. If the deans were by sickness or urgent business detained from their appearing and presiding in such conventions, they had power to constitute their subdeans or vicegerents. The place of holding these chapters was at first in any one church within the district, where the minister of the place was to *procure* for, that is, to entertain the dean and his immediate officers. But because in parishes, that were small and unfrequented there was no fit accommodation to be had for so great a concourse of people; therefore in a council at London under archbishop Stratford, in the year 1342, it was ordained, that such chapters should not be held in any obscure village, but in the larger or more eminent parishes. *Km.* 639, 640.

And one special reason why they seemed to have been formed in this realm after the manner of the courts baron is, because we find nothing of rural chapters in the ancient canon law. *Gibf.* 973. (v)

In pursuance of which institution of holding rural chapters, and of the office of rural deans in inspecting the manners of clergy and people, and executing the bishop's processses for the reformation thereof, we find a constitution of archbishop Peccham, by which it is required, that *the priests, on every Sunday immediately following the holding of the rural chapter, shall expound to the people the sentence of excommunication.*

And in these chapters continually presided the rural deans, until that Otho the pope's legate required the archdeacons to be frequently present at them; who being superior to the rural deans, did in effect take the presidency out of their hands: insomuch that in Edward the

(v) Lindwood, discoursing of these rural deans, says, *magis nituntur consuetudini patriæ quam juri communi.* P. 15.

first's reign, John of Athon gives this account of it; "Rural chapters," says he, "at this day are holden by the archdeacon's officials, and *sometimes* by the rural deans." From which constitution of Otho, we may date the decay of rural chapters; not only as it was a discouragement to the rural dean, whose peculiar care the holding of them had been; but also, as it was natural for the archdeacon and his official to draw the business that had been usually transacted there, to their own visitation, or, as it is styled in a constitution of archbishop Langton, to their own own chapter. *Gibf.* 973.

6. And this office of inspecting and reporting the manners of the clergy and people rendered the rural deans necessary attendants on the episcopal synod or general visitation, which was held for the same end of inspecting, in order to reformation. In which synods (or general visitation of the whole diocese by the bishop) the rural deans were the standing representatives of the rest of the clergy, and were there to deliver information of abuses committed within their knowledge, and to propose and consult the best methods of reformation. For the ancient episcopal synods (which were commonly held once a year) were composed of the bishop as president, and the deans cathedral or archpresbyters in the name of their collegiate body of presbyters or priests, and the archdeacons or deputies of the inferior order of deacons, and the urban and rural deans in the name of the parish ministers within their divisions, who were to have their expences allowed to them according to the time of their attendance, by those whom they represented, as the practice obtained for the representatives of the people in the civil synods or parliament. But this part of their duty, which related to the information of scandals and offences, in progress of time devolved upon the churchwardens; and their other office of being convened to sit members of provincial and episcopal synods, was transferred to two proctors or representatives of the parochial clergy in every diocese to assemble in convocation, where the cathedral deans and archdeacons still kept their ancient right, whilst the rural deans have given place to an election of two only for every diocese, instead of one by standing place for every deanry. *Ken.* 648, 649.

7. And albeit their office at first might be merely inspection, yet by degrees they became possessed of a power to judge and determine in smaller matters; and the rest they were to report to their ecclesiastical superiors. *Gibf.* 972.

And

Their attendance at the bishop's visitation.

Their judicial and other authority, ordinary and extraordinary.

Deans and chapters.

And by special delegation they had occasionally committed to them the probate of wills, and granting administration of the goods of persons intestate; the custody of vacant benefices, and granting institutions and inductions; and sometimes the decisions of testamentary causes, and of matrimonial causes, and matters of divorce. Of which there appear some footsteps in one of the legatine constitutions of Otho: by which it is enjoined, that the dean rural shall not thereafter intermeddle with the cognizance of matrimonial causes: and by another constitution of the same legate, he is commanded to have an authentic seal: all which shews, that anciently there was somewhat of jurisdiction intrusted with them. *Ken.* 641—4. 647. *Gibb.* 972. *God. Append.* 7.

And before their declining state, they were sometimes made a sort of *chorepiscopi*, or rural bishops: being commissioned by the diocesan to exercise episcopal jurisdiction, for the profits whereof they paid an annual rent: but as the primitive *chorepiscopi* had their authority restrained by some councils, and their very office by degrees abolished; so this delegation of the like privileges to rural deans, as a burden and scandal to the church, was inhibited by pope Alexander the third, and the council of Tours. *Ken.* 639. (2).

Their continu-
ance in their
office.

8. This office hath been always of a temporary nature; and is expressly declared so to be both by Lindwood and John de Athon. And this was the reason why the seals which they had for the due return of citations, and for the dispatch of such business as they should be employed about, had only the name of the office (and not as other seals of jurisdiction, the name of the person also) engraved in it. *Gibb.* 972.

But in the diocese of Norwich, the admission of rural deans seems to have been more solemn than elsewhere, and their continuance perpetual: for whilst that see was vacant, in the time of archbishop Witlesey, several rural deans there were *collated*, whereas in other places they are only said to be *admitted*; and in an ancient metropolitical

(2) For the nature of these *chorepiscopi*, who were appointed by the bishop of the diocese to govern a certain district within it, and were very numerous in the early ages of the church, but were afterwards abolished, see *Cujac.* tom. 2. *Ad. L. 6. tit. Pand. de Excusat. Dist.* 68. *Inst.* J. C. 1. 17:

visitation

visitation of the same diocese, the first in every deanry is such an one *perpetual dean*. Gibb. 972.

And perhaps several of the deans of peculiars may have sprung originally from rural deans.

9. Finally ; By the prescription and power of the arch-~~Their office~~ deacons and their officials, it happened, that in the next age before the reformation of our church, the jurisdiction of rural deans in this island declined almost to nothing. And at the reformation, in the publick acts of our reformers, no order was taken for the restoration of this part of the government of the church. In the *reformatio legum* this was provided for, but fell to the ground for want of confirmation by the legislative power. So that these rural officers in some deanries have become extinct, in others have only a name and shadow left. Nor do we find any express care further taken for the support of this office, but only in the provincial synod of convocation held at London, April 3, 1571, by which it was ordained, that “ the archdeacon when he hath finished his visitation, shall signify to the bishop what clergymen he hath found in every deanry so well endowed with learning and judgment, as to be worthy to instruct the people in sermons, and to rule and preside over others : out of these the bishop may chuse such as he will have to be rural deans.” But this is rather a permission, than a positive command, for the continuance of that office : however, it proves that rural deans were thought fit ministers to assist in dispensing the laws and discipline of our reformed church ; and it doth imply, that when they are deputed by the bishop, they may exert all that power which by canon and custom resided in the said office before the reformation. The little remains of this dignity and jurisdiction depend now on the custom of places, and the pleasure of diocesans. *Ken. 652, 653. God. Append. 7.*

Dedication of churches. See Church,

Defamation.

Defamation (a).

By statute.

1. BY the statute of *Circumſpecte agatis*, 13 Ed. 1. ft. 4. *In caufe of defamation, it hath been granted already, that it ſhall be tried in a ſpiritual court, when money is not*

(a) A man may defame another by words ſpoken, or in writing. When ſlander is reduced to writing, it is called a libel, which term comprehends alſo any defamatory picture or drawing, and the author of it may be puniſhed criminally by indictment, preſentment, or information, his conduct tending to a breach of the peace; or he may be ſued for damages in a civil action, and in ſome caſes may be cited into the ſpiritual courts. When ſlander is confined to words ſpoken, the two laſt modes of puniſhment only can be reſorted to, except the words are ſeditious, or ſpoken of a magiſtrate in the execution of his duty, or come within the ſtatute 9 and 10 W. 3. againſt blaſphemy and prophaneneſs, in which caſes the perſon uttering them may be indicted. Scandalous words are either actionable in themſelves, or not being actionable in themſelves become ſo from conſequential damages. Words are actionable in themſelves which impute to a perſon a crime for which he may be indicted and ſuffer corporal puniſhment, or which charge him with having a contagious diſorder, or which impute to him corruption or inability in an office of truſt and profit, or which tend to diſgrace him in his trade or profeſſion. Words not actionable in themſelves may become ſo, if they occaſion temporal damage to the party againſt whom they are ſpoken: thus, though it is not actionable to call a man a baſtard, or a clergyman a dunce or heretick, yet if in conſequence thereof the father of the one diſinherit him, or the other loſe preferment, an action will lie. Words which impute an offence cognizable in a ſpiritual court, may be puniſhed in that court. But three incidents are required in a ſuit for ſpiritual defamation. 1. That it concern matter merely ſpiritual, and determinable in the eccleſiaſtical court, as calling a perſon “heretick, ſchiſmatick, adulterer, fornicator, &c.” 2. It ought to concern matter merely ſpiritual only, for if ſuch defamation touches or concerns any thing determinable at the common law, the eccleſiaſtical judge ſhall not have cognizance of it. 3. He who is defamed cannot ſue there for amends or damages, but only for the puniſhment of the ſin, *pro ſalute anime*, 4 Rep. 20. and for coſts. If therefore words for which an action would lie are coupled with words which are a ſpiritual defamation, and a ſuit is inſtituted in the ſpiritual court for the whole, a prohibition lies; alſo if it be ſuggeſted to

not demanded, but a thing done for punishment of sin : in which case, the spiritual judge shall have power to take knowledge notwithstanding the king's prohibition.

It hath been granted already] By this it appeareth (saith lord Coke) that the cognizance of defamation was granted by act of parliament; for otherwise it could not be granted. 2 Inst. 492.

When money is not demanded] For in this case, he that is defamed cannot sue there for amends or damages; but only for correction of the sin, *pro salute animæ*. 2 Inst. 492.

And by the statute of articuli cleri, 9 Ed. 2. c. 4. *In defamations, prelates shall correct, the king's prohibition notwithstanding; first enjoining a penance corporal, which if the offender will redeem, the prelate may freely receive the money, tho' the king's prohibition be shewed.*

2. But to bring offences within these statutes, they must have these following incidents: Not for matters temporal.

As, first, the defamation must not be for matters temporal.

Thus if a man be called *thief* or *traytor*: if one be sued for such slander in the ecclesiastical court, a prohibition lieth. God. 516.

So if one call a man a *perjured* person; he must take his remedy for it at the common law. 2 Inst. 493.

to the court that a temporal damage has been received from words which are a spiritual defamation, or that other words for which an action would lie were coupled with them; for it would be vexatious to proceed in both courts. 3. Bac. Ab. 520. As to the modes of defence to which the autho. of defamation may resort, it is to be observed, that in a criminal prosecution for a libel, the truth of the charge is no justification, for it is a reason why the party offending should be brought to publick punishment, and not why he should be libelled, tho' by the 32 G. 3. c. 60. the jury may give a general verdict upon the whole matter put in issue. But in a civil action for damages, whether for publishing a libel or for uttering defamatory words, the defendant may justify, by stating on the record the truth of the charge, in such a manner as to give the plaintiff an opportunity of refuting it. B. N. P. 8. 1 T. Rep. 748. *Janson v. Stuart*. If a suit be instituted in the spiritual court for defamatory words, the defendant may justify or reconvene, as is noticed *infra*, 10 and 11.

Defamation.

M. 22 H. 8. A suit was in the spiritual court, for calling one a *false knave*; and a prohibition was granted: for *knave* originally was no word of reproach, but signified a man servant, and a knave child a man child. 2 *Inst.* 493. For albeit these words do not imply any offence of which the temporal law taketh cognizance, yet being also not of spiritual cognizance, the temporal courts will grant a prohibition, that the ecclesiastical courts may not exceed their jurisdiction.

In like manner a suit being commenced, for calling the plaintiff *quack*; a prohibition was granted, by reason of the uncertainty of that word. *God. 517.*

E. 9 W. Braithwaite and Matthews. Matthews libelled in the spiritual court against Braithwaite, for having said Matthews is a *rogue*, a cheating rogue, and keeps rogues company. And a prohibition was granted. *L. Raym. 212. (b)*

M. 10 W. A libel was preferred against a man in the spiritual court, for saying to another, Thou art an impudent brazenfaced *Beelzebub*: and a prohibition was granted. *L. Raym. 397. 2 Salk. 692.*

Nor for matters
spiritual mixed
with temporal.

3. Nor must the defamation be, for matters spiritual mixt with temporal.

Thus, *E. 11 W.* A libel was preferred in the ecclesiastical court for scandalous words, *viz.* You are a damned bitch, whore, a *pocky whore*, and if you have not the itch, you have the pox. And it was moved for a prohibition, because an action lies at common law. And this difference was taken, where the word *pox* is joined with other words, so that it cannot be understood but of the French pox, there the action lies. And by Holt chief justice: the joining it with the word whore, will make it to be understood of the French pox, which is actionable; and he cited a case where the words were, He got the pox by a yellow haired wench in Moorfields, and they were held actionable. And a prohibition was granted. *Ld. Raym. 446.*

H. 10 G. 2. Legate and Wright. It was moved for a prohibition to the spiritual court of Norwich, in a suit

(b) Neither can an action be maintained for calling one villain, rogue, or varlet, for these are words of mere passion and anger. 4 *Rep. 15. b. Secus*, if disgraceful words are spoken of a man in his profession. 1 *Vin. Ab. (S. a.)*

pending

pending there for defamation. The words were, You are an old rogue, and a *thief*, and I will prove you so, and an old *whoring* rogue, and a *bastard-getting* old rogue: it was allowed, that the latter words were of spiritual cognizance; but as the first was temporal, a prohibition will lie for the whole. And a rule was made to shew cause. On shewing cause, it was alledged that these words were not of a temporal nature sufficient to ground a prohibition. But the court held the contrary; and accordingly the rule was made absolute. 2 *Jur. Eccl.* 215.

4. But to intitle the spiritual court to jurisdiction, the defamation must be for matters merely spiritual. But for spiritual matters only.

Thus in the case of *Smith* and *Wood*, *M.* 5 *IV.* Libel in the spiritual court for these words, You are a rogue, rascal, *whoremaster*, and a son of a perjured affidavit bitch. A prohibition was moved for; and all the words being waived but the word *whoremaster* (none of them being such as an action may be brought for at the common law), it was urged that it is only a word of heat, and that words of passion are not defamatory, but regarded by the hearers no more than the words of one non-compos mentis or mad. But by Holt chief justice; to say whoremaster of a man, is the same with whore of a woman, which is an ecclesiastical slander. 2 *Salk.* 692.

H. 9 *Car.* *Gobbet's* case. A prohibition was prayed, to stay a suit in the spiritual court for defamation, in speaking these words, He is a *cuckoldly knave*; and a precedent was cited, that for saying he is a knave, and a cheating knave, suit being in the spiritual court, a prohibition was granted upon good advisement. But the court said, that precedent is not like to this case; for there was not any offence wherewith the spiritual court ought to meddle; but in this case, for these words, it is properly to be examined and punished there. And a prohibition was denied. *Cra. Car.* 339.

H. 2 *G.* 2. *Ferguson* and *Cuthbert*. A prohibition was moved to a suit in the spiritual court, for calling a woman *jilt* and *strumpet*, and saying he would cut his wife's legs off if she was such a strumpet: and denied; for, by the court they are a charge of incontinence, and the signification of them well known. *Str.* 823.

T. 40 *Eliz.* *Pollard* and *Armshaw*. Pollard and his wife brought an action against Armshaw for these words, Thou art a *whore*, for J. S. goldsmith, hath the use of thy body, and a cart is too good for thee. By the court, The words

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K

are

are of spiritual cognizance only, and the action will not lie *Gouldsb. 172. God. 519. (c)*

E. 3 An. Graves and Blanchet. An action was brought for these words, She is a *whore*, and had a bastard by her father's apprentice. And judgment was arrested. The court said, they could not overthrow so many authorities. The reason of the law is, that fornication is a spiritual offence; and no action lay at the common law for what the common law took no notice of, without special damage. *2 Salk. 696.*

E. 4 An. Auberry and Barton. A woman libelled against another in the spiritual court, for these words, 'You are a *brandy-nosed whore*, you stink of brandy. And a prohibition was moved for, because they were words of heat, and did rather charge the defendant with intemperance than incontinence. But by Holt, chief justice, prohibition hath been denied in like cases forty times. And a prohibition was denied. *L. Raym. 1136. (d)*

M. 7

(c) But an action for these words would lie in London, where by custom a whore (it is said) may be subjected to corporal punishment by the common law, viz. *carting, infra, 7.* For this reason prohibitions have been granted to a suit in the spiritual court, for publishing of a woman who lived in London, that she was a *strumpet*; and also for calling the husband of a woman who lived in London, *cuckold*, which is tantamount to calling her *whore*. *8 Mod. 114. Fortesc. Rep. 347. Str. 555.* Also for saying of a single woman in London, that *she was with child*. *Str. 545.*; from which we may conclude, that had the words been spoken out of London, a prohibition would have been denied. A similar custom is said to exist in the borough of Southwark. *1 Keb. 418. 1 Sid. 97.* And in Bristol, it is said, that offenders of this class may also be punished by the temporal courts, by custom. *Andrews 300.*

(d) A wife may institute a suit in a spiritual court without her husband joining in it, for words which charge her with adultery, because she is liable to do penance for the offence. *2 Roll. Ab. 298. 1 Roll. Rep. 426. 3 Bulst. 264. Motam v. Motam*, and the husband cannot release the suit against her will, though they be divorced *a mensa et thoro*, for the suit is to restore her credit. *Ib. et infra 12.* But a married man cannot maintain such a suit for being called *cuckold*, without his wife joining in it, because she only is defamed. *2 Lev. 66. Foster v. Davis; secus*, if he is called a *wittal*, because these words imply that he was privy to the adultery. Per Holt, Ch. J. *2 Salk.*

M. 7 Car. Hollingshead's case. Hollingshead prayed a prohibition to stay a suit in the spiritual court for defamation, for speaking these words, Thou art a *bawd*, and I will prove thee a bawd. And because these are words properly determinable in the spiritual court, and for which no action lies at the common law, the prohibition was denied. But for saying, Thou keepest an house of bawdry, this being a matter determinable at the common law by indictment, suit shall not be in the spiritual court. *Cro. Car. 229.*

So in the case of *Lockey and Dangerfield, M. 12 G. 2.* Libel in the spiritual court for these words, You are a *bawd*. And upon motion for a prohibition, cases were cited to prove, that an action would lie. But the court upon consideration discharged the rule; for it is not a charge of *keeping a bawdy house*, which is punishable as a temporal offence; an action will lie for these words, but for the word *bawd* only it will not; that being perhaps no more than a solicitation of chastity. *Str. 1100.*

5. *T. 35 Eliz. Davies and Gardiner.* An action upon the case of slander, was brought by Anne Davies against John Gardiner: that whereas there was a communication of marriage to be had, between the plaintiff and one Anthony Elcock; the defendant, to the intent to hinder the said marriage, said and published, that there was a grocer in London that did get her with child, and that she had a child by the said grocer; whereby she lost her marriage. To which the defendant pleaded not guilty, and was found guilty, at the assizes at Aylesbury, to the damages of 200 marks. And now it was alledged in arrest of judgment, that this matter appeareth to be merely spiritual, and therefore not determinable at the common law, but to be prosecuted in the spiritual court. But by the court, the action lies here; for a woman not married cannot by intendment have so great advancement as by her marriage, whereby she is sure of maintenance for her life, or during her marriage, and dower, and other benefits which the temporal laws give by reason of her marriage: and therefore by this slander she is greatly prejudiced in that which is to be her temporal advancement; for which it is

² *Salk. 692. Cro. Car. 339.* To say *whoremaster* of a man is the same with *whore* of a woman, which is an ecclesiastical slander, and a prohibition was denied. *Smith v. Wood. 2 Salk. 692.*

reason to give her remedy by way of action at the common law. *Poph. 36. (e)*

T. 9 Car. Penfon and Goody. Action upon the case: Whereas he keepeth an alehouse licensed by the justices, the defendant, to scandalize the plaintiff's wife, spake these words to her, Hang thee, bawd; thou art worse than a bawd; thou keepst a house worse than a bawdy house; and thou keepst a whore in thy house, to pull out my throat. Upon not guilty pleaded, it was found for the plaintiff. It was moved in arrest of judgment, that these words are not actionable. But it was agreed, that for saying one is a bawd, and keeps a bawdy house, an action lieth; because it is a temporal offence, for which the common law inflicts punishment: But to call one bawd, without further speaking, an action lieth not, no more than to call one whore; but it is a defamation punishable in the spiritual court. *Cro. Car. 329.*

So if a man who hath lands by descent sue in the ecclesiastical court against another for calling him bastard; a prohibition shall be granted, for this tendeth to a temporal disinheritation. *2 Roll's Abr. 292. (f)*

But in the case of *Bernard and Beale, E. 16 Ja.* On an action upon the case, for saying that the plaintiff had two bastards, and should have kept them, by reason of which words discord arose betwixt him and his wife, and they were likely to have been divorced; after verdict, it was moved in arrest of judgment, that these words were not actionable, because he doth not shew any temporal loss, as loss of marriage, or the like; and this imagination to be divorced is not to any purpose, for it is but a causeless fear. And of that opinion was the whole court. And therefore it was adjudged for the defendant. *Cro. Ja. 472. (g)*

(e) So an action was holden to lie for calling a man a *whoremaster*, by reason of which he lost his marriage with A. D. for a man may suffer temporal damage by loss of marriage as well as a woman. *Mathew v. Crafs. Cro. Jac. 323. S. P. Cro. Car. 269. Seutbold v. Daunston.*

(f) *Cro. Jac. 213.*

(g) So to say of a single woman that she had a bastard, is not actionable without special damage, or alledging that the child was likely to become chargeable to the parish. *1 Keb. 487. 6 Mod. 105. 1 Vin. Ab. 397. Contra Palm. 298. Vaughan v. Scandib; but to say of a maid that she is a man and not a woman, with special damage, is actionable. Cart. 55.*

6. Dr.

6. Dr. Gibfon says, If a minifter is defamed in any article relating to the difcharge of his minifterial function; ^{Wordsfpoken of a clergyman.} this is agreed by the books of common law, to be duly triable in the fpiritual court. *Gibf.* 1025.

But in the cafe of *Coxeter* and *Parfons*, *H.* 10 *W.* Dr. Parfons libelled againft Coxeter in the fpiritual court, for faying of him, He had no fenfe, was a dunce, and a blockhead, and he wondered that the bifhop would lay his hands upon fuch a fellow, and that he deferved to have his gown pulled over his ears. And a prohibition was granted: For a parfon is not punifhable in the fpiritual court for being a knave or a blockhead, more than another man. And whereas it was urged that a parfon might be deprived for want of learning, Holt chief juftice faid, If that be the cafe, he muft bring his action at law, for that was a temporal damage. 2 *Salk.* 692.

T. 19 *H.* 8. The prior of *Laund* libelled in the fpiritual court againft *Robert Lee* and *John Lee*, for calling the prior churl's fon, rotten churl, and cankered churl; and a prohibition was granted: for the words concerned no fpiritual matter, and therefore he could not fue for them in the ecclefiaftical court; neither could he have action for them at the common law. 2 *Inf.* 493.

H. 6 *G.* 2. *Mufgrave* and *Bovey*. A prohibition was granted to a fuit for thefe words, fpoken by one clergyman of another: You are an old rogue, and a rafcal, and a contemptible fellow, defpifed and hated by every body. *Str.* 946. (*b*)

7. *H.*

(*b*) So prohibition was granted to a fuit in the fpiritual court for publishing thefe words of a clergyman, *He is a fool, an afs, and a goofe*; for the words are words of heat, and do not touch him in his profefſion. *Newman v. Kingerby.* 2 *Lev.* 49. And for faying to a clergyman, *You are a knave, a knave, a knave indeed*; for per *Holt*, they do not relate to the function of a fpiritual perſon. *Com. Rep.* 25. Alfo for faying of a clergyman, *He is an ignorant impudent blockhead, his fpiritual advice is not fit to be followed, he is not fit to adminifter the facrament*; for per *Holt*, Ch. J. Though thefe words do reflect upon a clergyman in his profefſion, they do not charge him with any thing which is punifhable in a fpiritual court. 11 *Mod.* 140, 208. *Salk.* 692. But in a prior cafe it was holden, that a fuit might be inſtituted in a fpiritual court, for publishing of a clergyman, that *he preached nothing but lies and malice*; becauſe the queſtion, Whether a clergyman have diſcharged his duty properly? is fit to be tried in ſuch court.

K 3

3 *Lev.*

Words spoken
in London.

7. *H. 13 W. Johnson and Bewick.* A rule was made for a prohibition to be granted, unless cause shewed, to the consistory court of the bishop of Winchester, to stay a suit against the plaintiff by the defendant, for having said to the defendant, Thou art a whore; and for having said to the defendant's husband, You have married an old whore, and therefore have no children; upon suggestion of the custom of London to cart whores, and that these words were spoken in London. And on shewing cause against the rule, it was urged, that it appeared upon the face of the suggestion, that as well the plaintiff as the defendant lived out of the jurisdiction of London, viz. Bewick at Bewick in Middlesex, and Johnson in the parish of St. Olave's Southwark; and therefore it would be hard to deprive the defendant of punishing the plaintiff for having spoken these malicious and defamatory words, in a court where she may proceed, to drive her to another court where she cannot proceed, the plaintiff living out of the jurisdiction of the court. And of that opinion was the whole court. And Holt, chief justice, said, that if in such case a prohibition were granted, it would give licence to all the market women, when they were in London, to defame their neighbours without fear of punishment. And the rule was discharged. *L. Raym. 711.*

T. 5 G. Argyle and Hunt. Libel in the spiritual court, for the word whore; which upon the face of the libel appeared to have been spoken in London: and after sentence, it was moved for a prohibition, because the defect of jurisdiction appeared in the libel itself, and the court

3 *Lev. 17. Cranden v. Walden.* And on the authority of another case, to say of a beneficed clergyman, *He preacheth lies in the pulpit, is actionable*; for a lie is a false thing within his knowledge, and this is good cause of deprivation, by which he may have temporal damage. *Drake v. Drake. Sty. 363. 1 Roll. Ab. 58.* So to say of a clergyman, that he is a drunkard, a whoremaster, a common swearer, and a common liar, and hath preached false doctrine, and deserves to be degraded; for that the matters charged are good cause to have him degraded, whereby he should lose his freehold. *Dod v. Robinson, Alleyne 63.* To call one papist, no action lies; but to call a bishop so, an action will lie, for he is trusted with the government of the church. 2 *Brownl. 166.* Also to say of a clergyman, *that he has made a seditious sermon, and moved the people to sedition*; for they scandalize him in his function. 4 *Rep. 19. Phillips v. Badby.*

will

will judicially take notice of the custom of London where an action lies for the word whore. By the court: The rule is, that you shall never allege matter out of the libel, as a ground for a prohibition after sentence; but the foundation of our granting it must arise out of the libel itself in defect of jurisdiction. And if there be a defect of jurisdiction appearing in the libel, then the party never comes too late; for the sentence and all other proceedings are a mere nullity. But where the spiritual court hath an original jurisdiction, which is to be taken from them upon account of some matter arising in the suit, as for defect of trial; there after sentence the party shall never have a prohibition, because he himself hath acquiesced in their manner of trial, which is a waiver of the benefit of a common law trial. It is true, these words appear to be spoken in London; but how doth the custom of London appear to us? There is nothing of that in the libel; and though we have such a private knowledge of it, that upon motion we do not put the party to produce an affidavit, because the other side never disputes it, yet we cannot judicially take notice of it; and if any body shall insist on an affidavit, we must have it in every case. It was never known that the court judicially takes notice of private customs; but they are always specially returned. In the case of *Stone and Fowler, M. 9 An.* there was a prescription for the parishioners to repair the fences of the churchyard; and after sentence they came and suggested, that the rector was bound to those repairs; and that the spiritual court, inasmuch as the prescription was not admitted, had no power to proceed: but the court held, they came too late after sentence. *Str.* 187.

M. 8 Geo. Vicars and Worth. The wife libelled in the spiritual court, for words which appeared on the libel to be spoken in London; the words were (speaking to the husband), You are a cuckoldly old rogue, and was cuckolded by a porter. And against a prohibition it was urged, that the custom of London extends only to the word whore; and that words which only import a woman to be so, are not within the custom. But the whole court held the contrary; for prohibitions have been often granted where the words are tantamount. And a prohibition was granted. *Str.* 471.

T. 9 Geo. Cook and Wingfield. The word strumpet was held to be within the custom of London; but the defendant not coming for a prohibition till after sentence,

the court denied a prohibition, on the authority of *Argyle and Hunt*, tho' it appeared on the libel to be spoken in London. *Str.* 555.

Matters given
in evidence.

8. By the 1 Ed. 3. ft. 2. c. 11. intituled, No suit shall be made in the spiritual court against indictors: *The commons do grievously complain, that when divers persons, as well clerks as lay people, have been indicted before sheriffs in their turns, and after the inquest procured be delivered before the justices; after their deliverance they do sue in the spiritual court against such indictors, surmising against them that have defamed them, to the great damage of the indictors, wherefore many people of the shire be in fear to indict such offenders; the king will that in such case every man that feeleth himself grieved thereby, shall have a prohibition formed in the chancery upon his case.*

Before sheriffs in their turns] Altho' the statute provides expressly for indictors in the turns only; yet it extends as well to indictors in all other courts, and to all witnesses, and to all others who have affairs in the temporal court; and who shall not be therefore sued or molested in the court christian. 12 Co. 43.

In what time
the suit must be
commenced.

9. Regularly, if the party defamed doth not commence an action or cause of defamation, and contest suit in the same, within a year from the time of uttering the words, the action is taken away by the lapse of the year: for in such case, the plaintiff shall be supposed to have remitted the injury, at least not to recall it to mind; especially if the party defaming, and the party defamed after uttering of the words, have been very familiar and conversant together, as in eating, drinking, saluting each other, or other signs of familiarity. *Clarke, Tit.* 118.

But if the defamatory words were uttered in the absence of the plaintiff, he being then perhaps in remote parts out of the kingdom; and he doth institute the cause so soon as he returns, or at least within a year after his return to those parts, or to that parish in which the defamatory words were spoken, and causeth suit to be contested in the same; his action is not taken away. *Clarke, Tit.* 119.

By the statute of the 21 Ja. c. 16. *Actions upon the case for slanderous words shall be brought within two years after the words spoken, and not after: and if the jury find the damages under 40 shillings, the plaintiff shall have no more costs than damages.*

But by statute 27 Geo. 3. cap. 44. no suit for defamatory words shall be brought in any of the ecclesiastical

cal courts, unless the same shall be commenced within six calendar months from the time when such words shall have been uttered.

10. *M. 9 Ja. Webb and Cook.* Prohibition to stay a suit in the ecclesiastical court at Norwich for defamation, and calling him whoremaster, and saying that he had a bastard; and shews, that the defendant who sues in the spiritual court was sentenced for this cause of having a bastard, and ordered to keep the bastard at the sessions at Norwich. And notwithstanding, they would examine this again in the spiritual court. And upon this suggestion the defendant demurred. And it was adjudged, that the prohibition should stand: For being sentenced to be the reputed father by the justices of the peace, which is by the authority of the statute law, it cannot now be impeached in the spiritual court, nor elsewhere; and all are concluded to say the contrary, until it be reversed. *Gro. Ja. 625.*

So in *Cooke's case, E. 17 Ja.* The plaintiff sued the defendant in court christian, for calling him a bastard-maker; and the defendant justified, because he was proved to be such before two justices of the peace, according to the statute of the 18 *Eliz.* which plea the judges in the court christian refused: wherefore a prohibition was awarded. *2 Roll. Rep. 82.*

11. If any person is called to answer in a cause of defamation, if the plaintiff hath also defamed the defendant, the defendant may in the very same cause re-convene the plaintiff, that is, he may give a libel in the presence of the plaintiff and his proctor, tho' no citation was first taken out against him. But in these cases of re-convention, the parties must proceed together in the contesting of suit, in desiring one and the same term probatory, in the production of witnesses, in the conclusion, and in the pronouncing of sentence; and so in all things, unto the end of the suit. And if defamatory words, mentioned in the libel, are mutually proved, a mutual compensation is to be made, both as to the penance and the charges; that is, there ought to be no penance enjoined, nor any condemnation in charges on either part. But it is otherwise, where two separate causes of defamation are commenced. And note, that in causes of re-convention, tho' a compensation may be made between the parties, yet seeing defamers are by law to be corrected; the judge may, if he pleaseth, correct these defamers ex mero officio at his pleasure. *Clarke, Tit. 134.*

Cause where there are mutual defamations.

Husband cannot
release the wife's
suit.

12. *M. 10 Geo. Tarrant and Mawr.* The wife libelled in the spiritual court for calling her whore, and there being proceedings likewise for defamation against her by the other, the two husbands enter into an agreement to stay proceedings on both sides; and upon one of the wives going on, the husband moved for a prohibition: but it was denied. For, by the court, The suit is by the wife to recover her fame, and it is not in the power of the husband to restrain her. *Str.* 576.

But he may re-
lease the costs.

13. But if a feme covert sue in the spiritual court, and recover costs, if the husband release them, the wife is barred. For since the husband is liable to the charges of the suit expended by the wife, he shall have the costs in recompence; besides that, the wife cannot have a chattel interest exclusive of her husband. But if the husband dies, the wife shall have them, because they were a thing in action; and they shall not go to the executors of her husband. *Chamberlain and Hewitson. H. 7 W. L. Raym.* 74.

Sentence and
execution.

14. The punishment of defamation, is penance, to be enjoined at the discretion of the judge. And after passing of the sentence, the judge declareth, in the presence of the offender or of his proctor, the manner in which the penance shall be performed. And if the party is present, he is admonished by the judge (otherwise a monition issued against him under seal), to take out of the registry of the court a schedule of his penance, and to perform the same according to the form of the said schedule, and to make certificate of the due performance thereof on or before such court day as shall be appointed, and also to pay the costs taxed within a time limited, on pain of excommunication. *'I Ought.* 391, 2.

If the words were spoken in a publick place, then the penance is usually enjoined to be done publickly, as in the church of the parish where the person defamed dwelleth, in time of divine service, in the presence of the person defamed (if he has a mind to be present), but not covered with a linen garment as in causes of correction. But if the words were spoken in a private place, then the penance is done in the house of the person defamed, or of the minister, or of some other honest neighbour. *'I Ought.* 392.

And the form of words usually is this: The defamer publickly pronounces, that by such and such words (as are set forth in the sentence to have been spoken by him) he hath defamed the plaintiff; and therefore that he begs pardon and forgiveness, first of God, and then of the

the party defamed, for his uttering such words. 1 *Ought.* 392, 3.

Degradation.

1. **D**egradation is an ecclesiastical censure, whereby a clergyman is deprived of his holy orders which formerly he had, as of priest or deacon. *God. Rep.* 309.

2. And by the canon law, this may be done two ways : either summarily, or by word only ; or solemnly, as by divesting the party degraded of those ornaments and rites, which were the ensigns of his order or degree. *God. Rep.* 309.

3. Which solemn degradation was anciently performed in this manner, as is set forth in the sixth book of the decretals (i) : If the offender was a person in inferior orders, then the bishop of the diocese alone, if in higher orders as priest or deacon, then the bishop of the diocese, together with a certain number of other bishops, sent for the party to come before them. He was brought in, having on his sacred robes, and having in his hands a book, vessel, or other instrument or ornament appertaining to his order, as if he were about to officiate in his function. Then the bishop publickly took away from him, one by one, the said instruments and vestments belonging to his office, saying to this effect, This and this we take from thee, and do deprive thee of the honour of priesthood ; and, finally, in taking away the last sacerdotal vestment, saying thus, By the authority of God Almighty, the Father, the Son, and the Holy Ghost, and of us, we do take from thee the clerical habit, and do depose, degrade, despoil, and deprive thee of all order, benefit, and privilege of the clergy. *Gibf.* 1066.

And this seemeth to have been done in the most disgraceful manner possible ; of which there seem to be some remains, in the common expression of *pulling a man's gown over his ears*.

By *Can.* 122. 4. When any minister is complained of in any ecclesiastical court, belonging to any bishop of his

(i) 6°. 5. 9. 2.

province,

Delegates.

province, for any crime, the chancellor, commissary, official, or any other having ecclesiastical jurisdiction to whom it shall appertain, shall expedite the cause by processes and other proceedings against him : and upon contumacy continuing, excommunicate him. But if he appear, and submit himself to the course of law, then the matter being ready for sentence, and the merits of his offence exacting by law, either deprivation from his living, or deposition from the ministry (*k*), no such sentence shall be pronounced by any person whosoever, but only by the bishop with the assistance of his chancellor and dean (if they may conveniently be had), and some of the prebendaries, if the court be kept near the cathedral church ; or of the arch-deacon, if he may be had conveniently, and two other at least grave ministers and preachers, to be called by the bishop, when the court is kept in other places.

Delegates.

THE court of delegates is so called, because these delegates do sit by force of the king's commission under the great seal, upon an appeal to the king in the court of chancery, in three causes : 1. When a sentence

(*k*) As deposition, or degradation from the ministry, necessarily includes deprivation of benefice ; though a man may be deprived of his benefice without being degraded from the ministry ; I have, in enumerating the causes of deprivation, noticed such of them as appear to be also causes of degradation. The statute 23 *Hen. 8. c. 1. § 6.* reserves to the ordinary the power of degrading clerks convicted of treason, petit treason, murder, and certain other felonies there mentioned, before judgment. And Dr. Gibson observes, that in the judgment given against Dr. Leighton (6 *Car. 1.*) for publishing a seditious book, it is said as follows :—" And in respect the defendant hath heretofore entered into the ministry, and this court, for the reverence of that calling, doth not use to inflict any corporal or ignominious punishment upon any person so long as they continue in orders ; the court doth refer him to the high commission, there to be degraded of his ministry." Which being accordingly done, he was set in the pillory, whipped, &c. *Gib. cod. 1066. 2 Ru/bw. 56.*

Deprivation.

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is given in any ecclesiastical cause by the archbishop or his official. 2. When any sentence is given in any ecclesiastical cause in places exempt. 3. When a sentence is given in the admiral's court, in suits civil and marine, by the order of the civil law. And these commissioners are called delegates, because they are *delegated* by the king's commission for these purposes. 4 *Inst.* 339.

The law concerning this court, falleth in under the title Appeal.

Deprivation.

Deprivation is an ecclesiastical censure, whereby a clergyman is deprived of his parsonage, vicarage, or other spiritual promotion or dignity. *Deg.* p. 1. c. 9.

And the causes of such deprivation are properly and naturally determinable by the ecclesiastical laws of this realm (1): But because generally there are estates of freehold

(1) *Art.* 26.—The causes of deprivation may be classed under two heads: 1. Such as have been allowed by the common law, or created by statute. 2. Such as depend upon the canon law only.

1. Causes of deprivation allowed by the common law, or created by statute.

1. *Want of orders.*—Before the stat. 13 & 14 C. 2. c. 4. § 14, if a layman was presented, instituted, and inducted, he was parson *de facto*, and acts done by him while parson, such as marriages, leases, &c. were valid. *Cro. Eliz.* 775. But he might be deprived. *Hob.* 149. *Cro. Car.* 65. *Dy.* 292, 353. Now the above-mentioned statute enacts, that no one shall be capable to be admitted to any benefice who is not *ordained priest*.

2. *Illiteracy.*—Which Lord Hobart says, subjects a person to deprivation, being *malum in se*. *Hob.* 149.

3. *Want of age.*—Now regulated by 13 *Eliz.* c. 12. which declares admissions, institution, and inductions, contrary to the act, void. *March.* 119. *Gib. Cod.* 1068.

4. *Simony*—Was a crime at the common law. *Cro. Eliz.* 686. 789. *Cro. Car.* 361. and is now regulated by 31 *Eliz.* c. 6.

hold dependant upon these promotions and dignities, and annexed to them inseparably, which rest at the sole determination

c. 6. which declares the presentation, institution, and induction so obtained, *utterly void*.

5. *Plurality*.—By 21 H. 8. c. 13. But before the statute the first benefice was void by cession, if the parson took a second without dispensation. *F. N. B.* 34. *L.* Yet though the patron might present thereto if he would, he was not compellable to take notice till deprivation. *Cro. Car.* 357. Plurality was forbidden by the antient canon law. 6°. 1. 6. 15. X. 3. 4. 3. And by the constitutions of Othobon and Archbishop Pecham. *Atb.* 126. *Lind.* 136. *Gib. Cod.* 903, 905, 913.

6. *Conviction of treason, murder, or felony, by the temporal courts*.—On which conviction the ecclesiastical courts may build a sentence of deprivation. *Hob.* 121. But they cannot hold a plea of the crown. *Ib.* 290. The power of degrading clerks convict of certain of these offences, is reserved to the ecclesiastical court by 23 H. 8. c. 1.

7. *Incumbent refusing to use the book of common prayer, or speaking or preaching any thing in derogation thereof, or using any other rite or ceremony, being thereof twice convicted*,—shall *ipso facto* be deprived. 2 & 3 Ed. 6. c. 1. And 1 Eliz. c. 2. See *Cawdrie's Case*, 5 Rep. Pop. 59; and *Publick Worship*, II. 10.

8. — *not publicly reading the 39 articles of religion in the church whereof he has cure, in the time of common prayer, with declaration of his unfeigned assent thereunto within two months after induction*, shall be *ipso facto* immediately deprived. 13 Eliz. c. 12.

9. — *not being admitted to administer the sacraments within one year after induction, if not admitted before*, — shall be *ipso facto* immediately deprived. 13 Eliz. c. 12. Which is conformable with the antient law of the church. *Lind.* 64.

10. — *advisedly maintaining or affirming any doctrine contrary to the 39 articles, and when convented before the bishop or commissioners, persisting therein, and being thereof lawfully convicted*, — is cause for the ordinary to deprive by sentence. 13 Eliz. c. 12. See Can. 1603. XXXVIII.

11. — *not reading the morning and evening prayer, and declaring his unfeigned consent thereto, according to the prescribed form, within two months after actual possession, or in case of impediment within one month after such impediment removed*, — shall *ipso facto* be deprived. 13 & 14 Ch. 2. c. 4. § 6.

12. Every person in holy orders shall subscribe the declaration of conformity to the liturgy of the church of England, and shall procure a certificate under the hand and seal of the ordinary (who is required to make the same), and shall publicly and openly read
the

mination of the common law; the courts of common law do sometimes inspect and regulate the proceedings of the

the same, together with the declaration aforesaid, upon some Lord's day, within three months then next following, in his parish church, in the time of divine service, upon pain, if he fail therein, of being—utterly disabled, and ipso facto deprived. 13 & 14 Ch. 2. c. 4. § 8.—11. Explained by 1 W. & M. sess. 1. c. 8. § 11.

Note. By 23 G. 2. c. 28. The ordinary may allow of any lawful impediment for not complying with the statutes of 13 Eliz. & 13 & 14. c. 2.

9. Every ecclesiastical person, &c. shall take and subscribe the oaths of allegiance, supremacy, and abjuration, specified in 1 G. 1. st. 2. c. 13. at some of the courts of Westminster, or at the general or quarter sessions where he resides, within six calendar months after admission, which if he neglect or refuse, and be thereof lawfully convicted in any of the king's courts at Westminster, or the assizes, he shall suffer the several penalties enumerated, and—shall be disabled to be in any office, 1 G. 1. st. 2. c. 13. § 1. & 8. 9 G. 2. c. 26. § 3.

10. *Infidelity and Misdemeanor.*—Under which heads may be contained atheism, blasphemy, heresy, schism, and the like, which the laws of the church have always punished with deprivation. *Gib. Cod.* 1068. 5 Rep. 58. *b.* *Specot's case.* 5 Rep. 2, 54. And *note*, that the jurisdiction of the ecclesiastical court, in these cases, is reserved by 29 C. 2. c. 9. which takes away the writ *de heretico comburendo*. But as to heresy, see that title.

11. *Incontinence.*—In the reign of Eliz. *Fox & Burton* were deprived for adultery. 6 Rep. 13 *b.* *Hob.* 291. *Cro. Eliz.* 41.

12. *Drunkennes.*—8 Ja. 1. *Parker* was deprived by the high commissioners for drunkenness, and prohibition was denied. 2 *Brownl.* 37. And in an action of debt for not setting out tithes, the defendant having shewed the deprivation of the plaintiff, for drunkenness, by the high commissioners, the court held that for such a common fault, after admonition, the commissioners might deprive. 1 *Brownl.* 70. Add *Can. Apost.* 41.

13. *Disobedience to the orders and constitutions made for the government of the church.*—Agreed by all the justices. 2 Ja. 1. *Gro. Jac.* 37.

14. *Conviction of perjury in the temporal or ecclesiastical court.*—5 Ed. 4. 3. 5 Rep. 58. *Ayl. Par.* 208. *Gib. Cod.* 1068.

15. *Non-payment of tithes, according to 26 H. 8. c. 3. Certified by the bishop.*—By 2 & 3 Ed. 6. c. 20. the incumbent was to be adjudged *ipso facto* deprived of that benefice, where-
of

the ecclesiastical courts; and where they proceed against the rules of law, they frequently prohibit them: (especially

of such certificate was made. But now by 3 G. 1. c. 10. § 2. the defaulter is to forfeit double the value of the tithes; and the bishop is discharged from receiving them, and a collector appointed in his room.

See these three books.

1 Roll. Rep. 86.

16. *Dilapidation or alienation*.—Lord Coke says, that dilapidation of ecclesiastical palaces, houses, and buildings, is a good cause of deprivation. 3 *Inst.* and quotes 29 E. 3. 16. 2 H. 4. 3. 9 E. 4. 34. S. P. *Godb.* 259. But Dr. Gibbon doubts whether the punishment was ever inflicted, and observes that the books of canon law speak of *alienations* only. *Caus.* 10. 2. 8. 12. 2. 13. *Inst.* J. C. 2. 27. *Lind.* 148.

Under this head it is to be observed, that though the 21 H. 8. c. 13. declares the first benefice *void in law* by induction to a second; and the 13 *Eliz.* and 13 and 14 *Cb.* 2. declare that persons offending against them shall be *ipso facto* deprived, and the 31 *Eliz.* makes inductions contrary to it *utterly void*; yet if the persons instituted and inducted continue to act as incumbents, contrary to the provisions of those statutes, the ordinary may examine the matter, and declare the church void by sentence in the ecclesiastical court. *Watf. cb.* 5 & 6. *Cro. Eliz.* 252. & 686. And such declaratory sentence is proper, if not necessary, where the bishop intends to take the benefit of the lapse under the 13 *Eliz.* c. 12. See *Benefice VIII.* though not necessary to the patron or parishioner resisting the plenary. For where an act of parliament creates an avoidance, no declaratory sentence is necessary. 6 *Rep.* 29. B. Otherwise, where the avoidance is created by a lesser authority, as an ecclesiastical constitution. Thus though the constitutions of Otho and Othobon declare concubinage a cause of deprivation *ipso jure*, it is agreed that *sententia declaratoria delicti* is necessary. *Lind.* 15. *Atb.* 46. And such a declaratory sentence is also necessary where the canons inflict excommunication *ipso facto*. *Gib. Cod.* 1049. *Excommunication* 4.

II. Causes of deprivation by the canon law.

1. *Disclosing confessions*.—From anger, hatred, or even fear of death, was punished with degradation. *Walter. Lind.* 354.

2. *Wearing arms*.—Was punished with excommunication, and if the party remained contumacious, he was *ipso facto* deprived. *Othobon, Atb.* 85.

3. *Non-residence*.—*Stephanus. Lind.* 64. X. 1. 28. 2. See the form of process and sentence of deprivation of a rector for non-residence in the append. to *Gib. Cod.* § 10.

4. *Demanding*

tially where such sentence for any offence is inflicted by act of parliament.) *Dep. p. 1. c. 9.*

In all causes of deprivation of a person actually possessed of a benefice, these things must concur: 1. A monition or citation of the party to appear. 2. A charge given him, to which he is to answer, called a libel. 3. A competent time assigned for the proofs and answers. 4. A liberty for counsel to defend his cause, and to except against the proofs and witnesses. 5. A solemn sentence, after hearing all the proofs and answers. These are the fundamentals of all judicial proceedings in the ecclesiastical courts, in order to a deprivation. And if these things be not observed, the party hath just cause of appeal, and may have a remedy by a superior court. And these pro-

4. *Demanding money for sacraments*—Was considered as a species of simony, *C. 1. 1. 103.* and punished as such by Otho. *Atb. 81.*

5. *Obstinacy in an intruder, where institution had not been obtained, or where the prior incumbent was proved alive*—Was punished by Othobon with the loss of all benefices within the kingdom. *Atb. 66. Gib. Cod. 781. See Intrusion.*

6. *Violating a sanctuary*—Was punished by Othobon with excommunication, *ipso facto*; and if satisfaction were not made within a limited time, with deprivation. *Atb. 101.*

7. *Marriage and, à fortiori, Bigamy*—*Lind. 128. Otho Atb. 38. X. 3. 3. Dy. 133. Bigamy.* By 31 H. 8. c. 14. § 9. a priest keeping company with a wife was to suffer as a felon.

8. *Concubinage*—Was punished by degradation by *Alexander the 2d. Dist. 81. c. 16.* See also *Lind. 10. 127. Otho Atb. 47. Othob. Atb. 93.* And by 31 H. 8. c. 14. § 10. a priest keeping a concubine forfeited his goods, chattels, and promotions, and was to suffer imprisonment at the king's will.

9. *Contumacy in wearing an irregular habit*—After monition was punished with suspension, *ab officio et beneficio* by Archbp. Stratford, which could only be redeemed by payment of a 5th part of the profits of the benefice for one year to the poor. *Lind. 122. Vid. infra.*

10. *Officiating after excommunication without absolution.*—*X. 5, 27. 3 & 6. Gib. Cod. 1049.*

11. *Keeping solemn fasts other than such as are appointed by law*—Either publickly or privately, without the license and direction of the bishop under his hand and seal, or being wittingly present at any of them, is punished with suspension for the first fault, excommunication for the second, and deposition from the ministry for the third, by *Can. 72.*

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ceedings are agreeable to the common justice and reason of mankind; because the party accused hath the liberty of defence, and the right of appeal. 1 *Still.* 323. *Ayl. Parerg.* 309.

By *Can.* 122. Sentence against a minister, of deprivation from his living, shall be pronounced by the bishop only with the assistance of his chancellor and dean (if they may conveniently be had), and some of the prebendaries, if the court be kept near the cathedral church; or of the archdeacon, if he may be had conveniently, and two other at least grave ministers and preachers to be called by the bishop, when the court is kept in other places.

Devise. See *Wills*.

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Dilapidations of chancels, to be repaired by *lay impropriators*, are treated of under the title *Church* (m).

(m) A dilapidation, according to Parson's counsellor, *B.* 1. c. 8. is the pulling down, or destroying in any manner, any of the houses or buildings belonging to a spiritual living, or suffering them to run into ruin or decay; or wasting or destroying the woods of the church, or committing or suffering any wilful waste in or upon the inheritance of the church. And certainly, he adds, there can be nothing worse becoming the dignity of a clergyman than non-residence and dilapidations, which for the most part go hand in hand. In addition, therefore, to the doctrine of dilapidations of houses, treated of by the author under this title, which the bishop may prevent by spiritual censures, or for which the next incumbent may recover damages in the spiritual court, or in an action on the case at common law, either against the executor of his predecessor, or the predecessor himself, if he has taken other preferment; it will be proper to notice here the statute 35 *Ed.* 1. which prohibits rectors from cutting trees in the church-yard, except for repairing the chancel of the church. See *Church*, *V.* 3. And, in general, if a bishop cut down and sell the trees of his bishoprick, or a parson or prebendary commit waste, a prohibition lies at common law. 2 *Roll. Ab.* 813. *Regist.* 72. a. In analogy to which procedure, Lord Hardwicke, upon affidavit of waste committed, granted an injunction

A bishop as soon as he is installed, and a rector or vicar as soon as he is inducted, ought to procure workmen, as carpenters, masons, tilers, and others skilled in building, to view the dilapidations, or whatsoever shall want repairing, and write down for what sum a workman will or may rebuild or repair the same, and set their hands to the same for a memorial thereof when they shall be called to be witnesses thereunto. For after this inspection shall be made, such bishop, rector, or vicar, may commence his suit for dilapidations when he pleaseth. And such workmen, in support of the action, ought to prove that such decay cannot sufficiently be repaired or amended for less than such sum, and that they themselves would not do it for less. And that such proof may be sufficient, it is requisite, that there be two witnesses in every particular, and not one witness to one kind of work only, and another to another. *Clarke, Tit. 124. 1 Ought. 253.*

If the benefice hath been vacant for some time, as for three or four years; or if the incumbent hath not sued for some time after his induction or installation, nor caused the dilapidations to be viewed and estimated; he shall not be intitled to recover the whole sum estimated for dilapidations, but consideration shall be had of the time elapsed from the cessation of the last incumbency, and a proportionable deduction made for the decays which may reasonably be supposed to have happened during such intermediate time. *Clarke, Tit. 126. 1 Ought. 255.*

More particularly; concerning dilapidations, the following constitutions and statutes have been made:

Edm. If the rector of a church at his death shall leave the houses of the church ruinous or decayed, so much shall be de-

injunction out of Chancery to restrain further waste. *Bradly v. Stracey. 3 Barnard, 399. S. C. 2 Atk. 217.* And such an injunction will be granted at the suit of the patron in a common case, and in the case of a bishop, at the suit of the attorney-general for the king. But the patron cannot pray an account, for he cannot have any profit from the living. *Knight v. Mosely, Amb. 176.* A similar injunction has also been granted against the widow of a rector, at the suit of the patroness during the vacancy. *Hopkins v. Featherstone, 2 Br. 552.* In the Countess of Rutland's case, *1 Lev. 107. 1 Siderf. 152,* the court held that the digging of new coal mines in a glebe was not waste. But in the above-mentioned case of *Knight v. Mosely*, Lord Hardwicke said, that a parson cannot open mines, but may work those already opened.

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deducted out of his ecclesiastical goods as shall be sufficient to repair the same, and to supply the other defects of the church. The same we do decree concerning those vicars, who have all the revenues of the church, paying a moderate pension. For inasmuch as they are bound to the premises, such portion may well be deducted, and ought to be reckoned amongst the debts. Always nevertheless, having a reasonable regard to the revenues of the church, when such deduction is to be made. Lind. 250.

Shall leave the houses of the church ruinous or decayed] As, the manse of the rectory or vicarage; and other buildings whatsoever, the building or reparation whereof pertaineth to the rector or vicar *immediately*. But otherwise it seemeth to be, of those houses the building or reparation whereof pertaineth to others, as of tenants and vassals, by virtue of the tenure of their lands. *Id.*

So much shall be deducted] Either by himself in his last will and testament; or by the ordinary, whose office it is to provide for the church's good. *Id.*

Out of his ecclesiastical goods] Which he hath obtained in the right of his church: for such goods by tacit agreement are bound to the said reparation, but suppose (saith Lindwood) he hath not ecclesiastical goods sufficient; whether such reparation ought to be made out of his patrimonial goods hath been made a question. It seemeth (he says) that if he hath employed his ecclesiastical goods in the improving of his patrimony, or if by too much attention to his worldly affairs he hath neglected his ecclesiastical; in such case, he is bound to make satisfaction out of his patrimonial goods. *Id.*

As shall be sufficient] And if there be not sufficient, then so far forth as the goods will extend. *Id.*

To repair the same] Having regard to the exigencies and quality of the thing to be repaired; so as the same be for necessity, but not for pleasure. *Id.*

And to supply other defects of the church] So far forth as they belong to the rector or vicar to be sustained. *Id.*

Ought to be reckoned amongst the debts] And therefore to be preferred before legacies; for legacies are not to be paid, until the debts shall be first satisfied. *Id.*

But albeit the law allows the payment of dilapidations before legacies, yet the same are not to be paid before other debts; for the common law (Sir Simon Degge says) prefers the payment of debts before damages for dilapidations. *Dez. p. 1. c. 8.*

Othob. *To the intent that we may provide a remedy against the covetousness of divers persons, who altho' they receive*

ceive much substance from their churches and ecclesiastical benefices, do yet neglect their houses and other edifices, so as not to preserve them in repair, nor build them when ruinous and fallen down; by reason whereof deformity occupieth the state of the churches, and many inconveniencies ensue: We do ordain and establish, that all clerks shall take care decently to repair the houses of their benefices, and other buildings, as need shall require; whereunto they shall be earnestly admonished by their bishops or archdeacons; and if any of them, after the monition of the bishop or archdeacons shall neglect to do the same for the space of two months, the bishop shall cause the same effectually to be done, at the costs and charges of such clerk, out of the profits of his church and benefice, by authority of this present statute; causing so much thereof to be received, as shall be sufficient for such reparation. The chancels also of the church they shall cause to be repaired by those who are bound thereunto, according as is above expressed. Also we do injoin, by attestation of the divine judgment, the archbishops and bishops, and other inferior prelates, that they do keep in repair their houses and other edifices, by causing such reparations to be made as they know to be needful. Athon. 112.

That all clerks shall take care] Under which general expression are comprehended curates and prebendaries, and all others having any ecclesiastical benefice whatsoever. *Id.*
Whereunto they shall be earnestly admonished by their bishops or archdeacons] And this hath sometimes been done by a general monition throughout the diocese, or deanry. *Gibf. 751.*

Shall neglect to do the same for the space of two months] At least, to set about the same: for it may be that such time shall by no means be sufficient for the finishing thereof. *Id.*

Out of the profits of the church and benefice] So that it is lawful for the ordinary to sequester the same, for the making of such reparations. *Id.*

Causing so much thereof to be received] And sold to the best purchaser. *Id.*

As shall be sufficient for such reparation] According to the discretion of the bishop, as particular occasions require. The general practice is a fifth part. And if the party is dissatisfied, he may appeal. *Athon. 112. 1 Still. 61.*

Mepham. We do ordain, that no inquisition to be made concerning the defects of houses or other things belonging to an ecclesiastical benefice, shall avail to the prejudice of another, unless it be made by credible persons sworn in form of law, the
party

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party interested being first cited thereunto. And the whole sum estimated for the defects of houses or other things belonging to ecclesiastical benefices, whether found by inquisition, or by way of composition made, the diocesan of the place shall cause to be applied to the reparation of such defects, within a competent time to be appointed by his discretion. Lind. 254.

Inquisition to be made] Which may be done, not only at the instance of any party interested, but also by the judge himself *ex officio*. For the ordinary, without any application made by any person, may cause the houses of the church to be covenantably repaired out of the profits of the benefice. And such inquisition as aforesaid may be made without any fame of the defects preceding. And the reason is because it is done, not for deprivation of the parson, but for the amendment of the defects. *Id.*

Concerning the defects of houses or other things belonging to an ecclesiastical benefice] That is, of which the beneficed person hath the burden and charge of reparation; as of the chancel, inclosures, hedges, ditches, and such like. *Id.*

Shall avail to the prejudice of another] That is, of the beneficed person himself, if he be living; or of his executors or administrators, if he be dead. *Id.*

Unless it be made by credible persons] As for instance, able and experienced workmen; as also clergymen, having skill and knowledge in such matters, who are usually joined with laymen in the mandates for such inquisitions to be made. *Id.*

Sworn in form of law] That is, who shall swear, that they will truly make inquisition, without hatred or favour, or any interest which they have or shall have therein. *Id.*

The party interested being first cited thereunto] And if the witnesses of the party suing for dilapidations, either for favour, or because they have taken the work to be done, or have had a promise thereof, shall depose that the decays cannot be repaired for less than such a sum; the defendant, if he shall see cause, may produce witnesses to the contrary, and shall be allowed to carry workmen upon the premises to inspect the dilapidations, and may make exceptions, and disprove the estimate (if it is excessive) by more or more skilful workmen. *Clarke, Tit. 125.*

if the party cited doth not appear, through contumacy, the inquisition nevertheless may proceed. *Lind. 254.*

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Or by way of composition made] For the parties may agree, without any inquisition, for a certain sum to be laid out in the reparations. *Lind. 254.*

The diocesan of the place shall cause to be applied] So that his inferior, namely, the archdeacon, cannot by this constitution do that which followeth. For albeit the archdeacon may admonish the person beneficed to make due reparation; yet the bishop only shall cause so much of the profits to be received, as may be sufficient for making the reparations. *Lind. 254.*

Shall cause to be applied] By ecclesiastical censures and other lawful remedy, and also by sequestration of the profits. *Lind. 254.*

Within a competent time to be appointed by his discretion] In a just and reasonable manner; otherwise the party may appeal. *Lind. 254.*

By the statute of the 13 Eliz. c. 10. *Where divers ecclesiastical persons, being endowed and possessed of ancient palaces, mansion-houses, and other edifices and buildings belonging to their ecclesiastical benefices or livings, have not only suffered the same, for want of due reparations, partly to run to great ruin and decay, and in some part utterly to fall down to the ground, converting the timber, lead, and stones to their own benefit; but also have made deeds of gift, colourable alienations, and other conveyances of like effect, of their goods and chattels in their life-time, to the intent and of purpose after their deaths to defeat and defraud their successors, of such just actions and remedies as otherwise they might and should have had for the same against their executors or administrators by the laws ecclesiastical of this realm; to the great defacing of the state ecclesiastical, and intolerable charges of their successors, and evil precedent and example for others, if remedy be not provided: It is therefore enacted, that if any archbishop, bishop, dean, archdeacon, provost, treasurer, chaunter, chancellor, prebendary, or any other having any dignity or office in any cathedral or collegiate church; or if any parson, vicar, or other incumbent of any ecclesiastical living whereunto belong any house or houses, or other buildings, which by law or custom he is bound to keep and maintain in reparation, — do make any deed or gift, or alienation or other like conveyance of his moveable goods or chattels, to the intent and purpose aforesaid; the successor of him that shall make such deed of gift or alienation, shall and may commence suit, and have such remedy in any ecclesiastical court of this realm, competent for the matter against him or them to whom such deed of gift or alienation shall be so made, for the amendment and reparation of so much of the said dilapidations*

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pidations and decays, or just recompence of the same, as both happened by his fault or default: in such sort as he might or ought to have, if he is whom such deed of gift or alienation shall be so made, were executor or administrator of him that made such deed or alienation.

Note, here is no appearance of this statute being temporary: nevertheless it is continued as temporary by the 1 *Ja. c. 25*, and further by the 21 *Ja. c. 28*; and not further indefinitely (as a great many other statutes were) by the 10 *C. c. 4*. So that upon the whole there may perhaps be some doubt, whether this statute is now in force.

And other edifices and buildings] Altho' in this preamble, nothing is referred to as dilapidation, but decayed or ruinous buildings: yet it is certain, that under that name are comprehended hedges, fences, ditches, and such like; and it hath been particularly adjudged concerning wood and timber, that the felling of them by any incumbent (otherwise than for repairs or for fuel), is dilapidation; from which he may be restrained by prohibition during his incumbency, and for which he or his executors are liable to be prosecuted, after he ceaseth to be incumbent. *Gibf. 752. 2 Bull. 279. 3 Bull. 158. More 917.*

Against their executors or administrators] This act only makes provision against the particular abuse of fraudulent deeds to defeat the successor, after the incumbent is dead; but by the rules of the church (as appears by the foregoing constructions) the ordinary, in case of dilapidations, hath a right to take cognizance of them, during the life of the incumbent, either by voluntary inquisition, or upon complaint made to him; or to enforce reparation by sequestrating the profits, or by ecclesiastical censures, even to deprivation. *Gibf. 753. 3 Inst. 204.*

Their executors or administrators] In a suit for dilapidations in the spiritual court, the executor of an administrator prayed a prohibition, upon oath that he had no goods of the first intestate: and the court agreed, that the executor of the administrator is not liable, unless he hath goods of the first intestate, or be administrator of goods not administered by such administrator; upon which, the prohibition was granted, and stood. *Gibf. 753. 3 Keb. 69.*

By the laws ecclesiastical of this realm] In acknowledgment of the right of the ecclesiastical courts to the sole cognizance in the case of dilapidations, a writ of consultation is provided in the register. *Gibf. 753.*

And

And Sir Simon Degge says, suits for dilapidations are most properly and naturally to be brought in the spiritual courts: and no prohibition lieth. But nevertheless, he says, the successor may (if he will) upon the custom of England, have a special action upon the case against the dilapidator, his executors, or administrators. *Deg. p. 1. c. 8. Wats. c. 39. 1 Bac. Abr. 63.*

So in the case of *Jones and Hill, E. 2. IV.* An action upon the case was brought by a parson for dilapidations, against his predecessor who had accepted another benefice, and left the houses out of repair, setting forth, that by the custom of the realm he ought to pay to the successor so much as shall be sufficient to make the reparations, and that the repairs do amount to so much: it was moved in arrest of judgment, that this action doth not lie. And of that opinion was Pollexten chief justice, who tried the cause, and was of the same opinion now, because it was merely suable in the ecclesiastical court. And tho' the case of *Day and Hollington, M. 3 Ja. 2.* was cited as adjudged for the plaintiff on a demurrer; yet the court now inclined to Pollexsen's opinion. But the case being in the paper to be argued again, and Pollexsen and Ventris dying in the mean time, and the case being argued again before Powell and Rookeby justices, they gave judgment for the plaintiff. *3 Lev. 268. Viner. Actions. O. c. Viner. Dilapidations (n).*

[Or other incumbent of any ecclesiastical living] In the case of the curate of *Orpington, H. 27 & 28 C. 2.* who was appointed by the impropiator, and licensed by the archbishop as ordinary; the court held, that being but curate at will, and not instituted and inducted, he was not an incumbent within this statute, nor liable to dilapidations; and accordingly prohibition was awarded to stay suit against him in the spiritual court. *3 Keb. 614.*

But these curates are included within the aforesaid constitution of Othobon. And even with respect to this statute, it seemeth that this adjudication did proceed upon a principle at least doubtful, namely, that such curates are

(n) It is now settled that an action on the case for dilapidations lies at common law; and it makes no difference, whether it be brought against the executor of the incumbent, or the incumbent himself, who has accepted other preferment. *Radcliffe v. Doyly. 2 T. Rep. 630. See Deans and Chappels, lll. 16.*

but curates at will. In the case of curacies augmented by the governors of queen Anne's bounty, it is certain, by the statute of 1 G. 3. c. 10. that they are perpetual cures and benefices. And as to the rest, it seemeth most natural, from the very words of this statute, to understand this expression [*or other incumbent*] to denote especially perpetual curates; for archbishops, bishops, deans, archdeacons, chancellors, prebendaries, and such like, had been mentioned before; and then the act goes on, and recites parsons, vicars, *or other incumbent of any ecclesiastical living, whereunto any houses or buildings do belong.* And what other incumbents these should be, if they are not perpetual curates, it is not easy to determine.

As hath happened by his fact or default] This statute, in the particular case of a fraudulent conveyance, seems at first sight to limit the suit to the dilapidations that have grown in the time of the last incumbent; which (in case his predecessor did also leave dilapidations, and die insolvent) cannot be known, but by a regular survey of the defects at his first coming in, that thereby the respective dilapidations of the two predecessors may be distinguished. But in other cases, the last incumbent, or his executors, are chargeable with the whole dilapidations in whose time soever they have grown; and the reason is, because he had the same remedy against the executors or administrators of his predecessor, and it was his own fault if he did not make use of it. *Clarke*, Tit. 122. And if such predecessor was insolvent; he accepted the benefice with that charge and incumbrance upon it.

And agreeably to this general rule may this statute also be well interpreted, so as to make this clause [*by his fact or default*] to be exclusive, not of dilapidations which have grown in the time of the predecessors to the deceased, but of such as may have grown between the time of his decease, and the prosecution for them; that is, either in the time of the vacation of the benefice, or since the time of the present incumbent. *Gibf.* 753. 4.

By the 14 Eliz. c. 11. *All sums of money to be recovered for or in the name of dilapidations, by sentence, composition, or other wise, shall within two years after such receipt, be truly employed upon the buildings and reparations, in respect whereof such money for dilapidations shall be paid; on pain that every person so receiving and not employing as aforesaid, shall forfeit double as much as shall be so by him received and not employed; which forfeiture shall be to the use of the queen's majesty, her heirs and successors.* s. 18.

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In case of the incumbent's death within the two years, it seemeth that the same ought to be paid by his executors to the successor, to be laid out by him (and not by the executors) in repairs. *Gibf. 754.*

Finally, In order to prevent dilapidations, it is enacted by the 17 G. 3. c. 53. as followeth:

Where the parson, vicar, or other incumbent of any ecclesiastical living, parochial benefice, chapelry, or perpetual curacy, being under the jurisdiction of the bishop or other ecclesiastical ordinary, is desirous to build or improve the buildings belonging to his benefice, which one year's neat-income will not be sufficient to put in due repair, he must first procure a certificate from an experienced workman, containing a state of the buildings, the value of the timber and other materials fit to be employed in building or repairing, or to be sold, and also a plan or estimate of the work, which must be verified upon oath before a justice of the peace or master in chancery, ordinary or extraordinary. He must also make out in writing, to be signed and verified by him on oath as aforesaid, a particular account of the annual profits of the living.

These must be laid before the ordinary and patron; in order to obtain their consent to such purposed buildings or repairs.

But the ordinary, before he gives his consent, shall cause an inquiry to be made of the state and condition of the buildings at the time when the incumbent entered, how long he hath enjoyed the living, what he hath received for dilapidations, and how the same hath been laid out: and if it shall appear that the incumbent had by wilful negligence suffered the buildings to go out of repair, he shall pay down so much as the damages thereby occasioned shall amount unto, before the ordinary shall give his consent.

If the patron is a minor, idiot, lunatic, or feme covert, the guardian, committee, or husband respectively may act for them.

If the several parties shall declare their consent by writing under their hands, the incumbent may borrow at interest such sum as the said estimate shall amount unto, after deducting the value of the timber or other materials which may be thought proper to be sold, not exceeding two years value of the living after deducting all outgoings, except only the salaries to assistant curates where necessary: and as a security for the money so borrowed, he may mortgage the glebe, tithes, and other profits of the living,

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for 25 years, or until the principal, interest, and costs shall be paid.

And the mortgagee shall execute a counterpart of the mortgage, to be kept by the incumbent; and a copy thereof shall be deposited in the bishop's registry.

And on failure of payment of principal and interest for forty days after the same shall become due, the mortgagee may distrain in like manner as rents may be recovered by landlords from their tenants.

And a proper person shall be appointed by the ordinary, patron, and incumbent, to receive the money borrowed; who shall give bond to apply the same for the purposes intended, and shall make contract, pay the workmen, and when finished render a due account, to be entered in the registry aforesaid.

Where new buildings are necessary, the ordinary, patron, and incumbent may purchase any building within one mile of the church, and land not exceeding two acres, if the living is under 100*l.* a year; if above, then not exceeding two acres for every 100*l.* a year. And the purchase money may be raised by sale or exchange of some part of the glebe or tithes.

And every such incumbent shall annually, at his own expence, from the time such buildings shall be compleated, insure at one of the offices in London or Westminster the said houses against accidents by fire, at such sum as the ordinary, patron, and incumbent shall agree on: And on neglect of such insurance, the ordinary may sequester the profits, till such insurance shall be made.

And every incumbent successively shall pay the interest [of the principal money due upon such mortgage, yearly, as the same shall become due, or within one month after, and also 5*l.* per centum of the money originally advanced upon such mortgage; 21 G. 3. c. 66.] and if such incumbent shall not reside twenty weeks within each year, computing from the date of the mortgage deed, he shall instead of 5*l.* pay 10*l.* per centum yearly; such payments to be made till the whole principal and interest shall be discharged: And in default of such payment, the ordinary may sequester the profits as aforesaid.

And where there shall be no house, or a very mean one, on a living worth above 100*l.* a year, and the incumbent shall not reside in the parish twenty weeks within any year, and he shall not think fit to lay out one year's income where the same may be sufficient, nor to apply in manner aforesaid for two years income, the ordinary, with
consent

consent of the patron, may procure such plan, estimate and certificate as aforesaid, and proceed in the execution of the purposes of this act, as if the incumbent had consented; and the mortgage executed by the ordinary shall be binding on the incumbent and his successors.

And the governors of queen Anne's bounty may lend money not exceeding 100l. in respect of a living not exceeding 50l. a year, without interest; and where the annual value exceeds 50l. they may lend any sum not exceeding two years income at the interest of 4 per cent.

And colleges and other corporate bodies, having the patronage of livings, may lend money for the purposes aforesaid without interest (e).

Note, The forms of instruments relative to the aforesaid proceedings, are drawn out specially in the act itself (with a supplement by the 21 G. 3. c. 66).

Dimissory letters. See Ordination.

Diocese.

Diocese (from *diocesis*, *seorsim habito*;) signifies the circuit of every bishop's jurisdiction. For this realm hath two sorts of divisions; one into shires or counties in respect of the temporal state; and another into dioceses, in regard to the ecclesiastical state. 1 *Inst.* 94.

2. The bounds of dioceses are to be determined by witnesses and records, but more particularly by the administration of divine offices. To which purpose, there are two rules in the canon law: in one case, upon a dispute between two bishops upon this head, the direction is, that they proceed in the business, by ancient books or writings, and also by witnesses, reputation, and other sufficient proof:

(e) It has been decided that money given by will to erect a parsonage house at the end of the garden of the former parsonage house, is not within the statute of mortmain, no land being to be purchased. *Brodie v. Duke of Chandos*. 1 Br. 444. 2 Ed. And the same point was ruled as to 1000l. given by archbishop Secker, to be laid out in repairing parsonage houses. *Attorney-General v. the Bishop of Chester*. 1b.

in the other case, where the question was, by whom a church built upon the confines of two dioceses should be consecrated; the rule laid down is, that it should be consecrated by the bishop of that city, who before it was founded, baptized the inhabitants, and administered to them other divine offices. *Gibf. 133. (p)*

Jurisdiction.

3. The jurisdiction of the city is not included in the name of *diocese*. So saith the canon law: and accordingly, in citations to general visitations, directed to the clergy, it is ordered to cite the clergy of the *city and diocese*. *Gibf. 133.*

Bishop in another's diocese.

4. A bishop may perform divine offices, and use his episcopal habit, in the diocese of another, without leave (q), but he may not perform therein any act of jurisdiction, without permission of the other bishop. *Gibf. 133, 134. (r)*

Clerk in two dioceses.

5. A clergyman dwelling in one diocese, and beneficed in another, and being guilty of a crime, may, in different respects, be punished in both: that is, the bishop in whose diocese he dwells, may prosecute him; but the sentence, so far as it affects his benefice, must be carried into execution by the other bishop. *Gibf. 134. (s)*

Dispensation.

NOTwithstanding the statute of provisors, and divers other statutes against the papal incroachments upon the ecclesiastical jurisdiction in this realm, the pope's power still prevailed against all those statutes; and particularly in the matter of dispensations, which was one great branch of the revenue of the apostolick see.

But by the statute of the 25 H. 8. c. 21. it is enacted, that no person shall sue to the bishop or see of Rome, or to any person having or pretending any authority by the same, for licenses, dispensations, compositions, faculties, grants, rescripts, delegacies, or any other instruments or writings, for any cause

(p) *X. 2. 19. 13. 3. 36. 1.*

(q) *Clem. 5. 7. 2.*

(r) Except against those who have by force expelled him from his own diocese. *Clem. 2. 2.*

(s) *X. 2. 2. 14.*

or matter for which any license, dispensation, composition, faculty, grant, rescript, delegacy, instrument, or other writing, hath been used to be obtained at the see of Rome, or by authority thereof, or of any prelates of this realm; or that in causes of necessity may lawfully be granted without offending the laws of God: but the same, necessary for the king and his subjects, upon due examination of the causes and qualities of the persons procuring the same, shall be granted within the realm and not elsewhere, in manner following, and none otherwise; that is, The archbishop of Canterbury shall have power, by his discretion, to grant by an instrument under his seal, unto the king, his heirs and successors, as well all such licences, dispensations, compositions, faculties, grants, rescripts, delegacies, instruments, and all other writings, for causes not being contrary to the laws of God, as have been used to be obtained by the king or any of his subjects at the see of Rome, or any person by authority of the same; and all other licences, dispensations, faculties, compositions, grants, rescripts, delegacies, instruments, and other writings, upon all such matters as shall be convenient and necessary to be had, for the honour and surety of the king, and the wealth and profit of the realm: so that the said archbishop in no wise shall grant any dispensation, licence, rescript, or any other writing afore rehearsed, for any cause repugnant to the law of God. l. 3.

And the said archbishop, after due examination of the causes and qualities of the persons procuring the same, shall have power by himself, or by his sufficient and substantial commissary or deputy, by his discretion from time to time to grant and dispose, by an instrument under the name and seal of the said archbishop, to any of the king's subjects, all manner of licences, dispensations, faculties, compositions, delegacies, rescripts, instruments, or other writings, for any such cause or matter, whereof heretofore the same have been accustomed to be had at the see of Rome, or by the authority thereof, or of any prelate of this realm. l. 4.

Nevertheless, the said archbishop or his commissary shall not grant any other licence, dispensation, composition, faculty, writing, or instrument, in cases untwont and not accustomed to be had at the court of Rome, nor by authority thereof, nor by any prelate of this realm, until the king or his council shall be advertised thereof, and determine whether the same shall commonly pass as other dispensations faculties or other writings shall or no; on pain that the grantor shall make fine at the king's will: and if it be determined by the king or his council that the same shall pass, then the said archbishop or his commissary, having licence
of

Dispensation.

of the king by his bill assigned, shall dispense with them accordingly. §. 5.

*Provided, that no dispensation, licence, faculty, or other rescript or writing to be granted by the said archbishop or his commissary, being of such importance, that the tax for the expedition thereof at Rome extended to the sum of 4*l.* or above, shall in any wise be put in execution, till it be confirmed by the king under the great seal, and enrolled in the chancery, in a roll by a clerk to be appointed for the same; and this act shall be a sufficient warrant to the chancellor or keeper of the great seal, to confirm in the king's name the aforesaid writings passed under the said archbishop's seal, by letters patents in due form to be made under the great seal: remitting as well the said writing under the archbishop's seal, as the said confirmation under the great seal, to the parties from time to time procuring for the same. And all such licences, dispensations, and other writings, for the expedition whereof the said taxes to be paid at Rome were under 4*l.* which be matters of no great importance, shall pass only by the archbishop's seal, and shall not of any necessity be confirmed by the great seal, unless the procurers thereof desire to have them so confirmed; in which case they shall pay for the said great seal, to the use of the king, 5*s.* and not above, over and besides such taxes as shall be hereafter limited for the making, writing, registering, confirming and enrolling of such licences, confirmations and writings, under the said tax of 4*l.* §. 6.*

*And every such licence, dispensation, composition, faculty, rescript, and writing, for such causes as the tax was wont to be 4*l.* or above, so granted by the archbishop, and confirmed under the great seal; and all other licences, dispensations, faculties, rescripts, and writings to be granted by the archbishop, whereunto the great seal is not limited of necessity to be put, by reason that the tax of them is under 4*l.*; shall be as effectual in the law, as if they had been obtained of the see of Rome, or of any other person by authority thereof, without any revocation or repeal thereof to be had. §. 7.*

And all children procreated after solemnization of any marriage to be had by virtue of such licences or dispensations, shall be taken to be legitimate, in all courts as well spiritual as temporal, and in all other places, and shall inherit the inheritance of their parents and ancestors. §. 8.

And the archbishop shall constitute a clerk, who shall write and register every such licence, dispensation, faculty, writing, or other instrument to be granted by the said archbishop; and shall find parchment, wax, and silken laces convenient for the same; and shall take for his pains such sums as are in this act hereafter

hereafter limited: And the king, by letters patents under the great seal, shall constitute one sufficient clerk, being learned in the course of the chancery, who shall always be attendant upon the lord chancellor or keeper of the great seal; and shall make, write, and inroll the confirmation of all such licences, dispensations, instruments, or other writings, as shall be thither brought under the archbishop's seal, there to be confirmed and inrolled; and shall also intitle in his books, and inroll of record, such other writings as shall thither be brought under the archbishop's seal, not to be confirmed; taking for his pains the sums in this act hereafter appointed. And as well the said clerk appointed by the archbishop, as the clerk appointed by the king, shall subscribe their names to every such licence, dispensation, faculty, or other writing, that shall come to their hands to be written, made, granted, sealed, confirmed, registered, and inrolled. f. 9.

And there shall be two books made of one tenor, in which shall be contained the taxes of all customable dispensations (1) faculties, licences, and other writings wont to be sped at Rome; which book, and every leaf of those books, and both sides of every leaf, shall be subscribed by the archbishop of Canterbury, the lord chancellor, the lord treasurer, and the two chief justices; to which books all suitors for dispensations, faculties, licences, and other writings afore rehearsed, shall have recourse if they require it; and one of the said books shall remain in the hands of the said clerk to be appointed by the archbishop, and the other to remain with the clerk of the chancery to be appointed by the king; which clerk of the chancery shall also intitle and note particularly and daily in his book ordained for that purpose, the number and qualities of the dispensations, faculties,

(1) By this book, of which one copy at least is still remaining, we see the extent of the powers originally conveyed to the archbishop of Canterbury by this act; and by comparing those powers with several statutes which have been since made, we see in what particulars they have been limited and restrained. For the age required for institution to a benefice, the ages required for orders, the degrees within which persons may or may not marry, and several heads which are there set down as *cases dispensable*, have been since fixed by particular acts of parliament, and rendered unalterable by dispensation. And as to the cases that are still dispensable, (such as pluralities, unions, commendams, notarie, orders *extra tempora*, and the like;) whatever is to be observed of them will fall most properly under their respective heads. Gib. Cod. 91.

Dispensation.

licences, and other writings, which shall be sealed only with the seal of the archbishop, and also which shall be sealed with the said seal, and confirmed with the great seal. §. 11.

And no man suing for dispensations, faculties, licences, or other writings, which were wont to be sped at Rome, shall pay any more for the same, than shall be limited in the said duplicate books of taxes; only compositions excepted, of which, being arbitrary, no tax can be made, wherefore the tax thereof shall be set and limited by the discretion of the said archbishop and the lord chancellor or lord keeper of the great seal; and such as exact or receive of any suitor more than shall be contained in the said book of taxes, shall forfeit ten times as much, half to the king, and half to him that shall sue. §. 12.

And the said tax shall be employed and ordered as hereafter enjoineth; that is, if the tax extend to 4^l or above, by reason whereof the writing which shall pass by the archbishop's seal must be confirmed by the appension of the great seal, the same shall be divided into three parts; two parts whereof shall be divided into four, of which three parts shall go to the king, and the remaining fourth part shall be divided into three, whereof the chancellor or lord keeper shall have two, and the said clerk of the chancery one. And the remaining third part of the whole tax shall be divided into three; whereof the archbishop shall have two, and his officers one, which one part shall be divided equally between the said clerk or register, and the archbishop's commissary appointed to seal the said instruments. §. 13.

If the tax be under 4^l, and not under 40s, then the said tax shall be divided into three parts as is aforesaid, whereof the king shall have two parts, abating 3^l 4d, which shall be to the said clerk of the chancery for his trouble; and the archbishop and his officers shall have the third part, of which the archbishop shall have one moiety, and his said clerk and commissary the other moiety, equally betwixt them. And if the tax be under 40s, and not under 26s 8d; it shall be divided into two parts, whereof one shall be to the king, deducting 2s for the said clerk of the chancery for his pains; and the other shall be to the archbishop and his officers, whereof the archbishop shall have one moiety, and his said clerk and commissary the other moiety equally betwixt them. And if the tax be under 26s 8d, and not under 20s; the same shall be divided into two parts, whereof the king shall have one, abating 2s to the said clerk of the chancery; and the archbishop and his said clerk and commissary shall have the other part equally amongst them. And if the tax be under 20s; the same shall be to the said commissary, clerk of the archbishop, and clerk of the chancery, equally amongst them. §. 14.

Provided,

Provided, that this act shall not be prejudicial to the archbishop of York, or to any bishop of this realm; but that they may lawfully dispense in all cases, in which they were wont to dispense by the common law or custom of the realm before the making of this act. s. 15.

And if it happen that the see of the archbishoprick of Canterbury shall be void; then such licences, dispensations, faculties, instruments, and other writings shall, during the vacation, be granted under the name and seal of the guardian of the spiritualities. s. 16.

And if the archbishop or guardian of the spiritualities shall refuse or deny to grant any licences, dispensations, faculties, instruments, or other writings, to any person that ought, upon a good, just and reasonable cause to have the same; then the chancellor of England, or the lord keeper of the great seal, on complaint thereof made, shall direct the king's writ to the said archbishop or guardian, enjoining him, upon a certain pain therein to be limited, that he shall in due form grant the same, or else signify to the king in the court of chancery at a certain day, for what cause he refused to grant the same; and if it shall appear to the said chancellor or lord keeper, upon such certificate, that the cause of refusal was reasonable, just and good, then it so being proved by due search and examination shall be admitted and allowed. And if it shall appear upon the said certificate, that the cause of refusal was not just and reasonable, then the king being thereof informed, after due examination had that the same may be granted without offending the law of God, shall have power to send his writ of injunction under the great seal out of the chancery, commanding the archbishop or guardian to make grant thereof, by a certain day, and under a certain pain in the said writ to be contained. And if the said archbishop or guardian, after receipt of the said writ, refuse or deny to grant the same as enjoined by the said writ, and shew no just cause why he should do so; then he shall forfeit such pain and penalty as shall be limited and expressed in the said writ of injunction. And the king may give power, by commission under the great seal, to two such spiritual prelates or persons as will do and grant the same. s. 17.

And if any person shall sue to the court or see of Rome, or to any person claiming authority by the same, for any licence, faculty, dispensation, or other thing contrary to this act, or put the same in execution, or attempt to do any thing contrary to this act; he shall incur a præmunire. s. 22. And by the 13 Eliz. c. 2. s. 3. he shall be guilty of high treason.

Without offending the laws of God] By this clause the archbishop was restrained from granting dispensations of several

ed kinds which the pope usually granted, and in other countries he still grants; as, for marriages within the degrees prohibited, for an abbot who is married to have another tongue to have a benefice, and 'before the flames of dissimulation, for an appropriation of a benefice with cure to a nun etc. *Grot. l. 6, l. 14.*

In matters following, and now obsolete? The kings of England from time to time, in every age, before the time of Henry the eighth, were used to grant dispensations in causes ecclesiastical. *Grot. l. 1. c.*

And notwithstanding this negative clause, it hath been held and allowed, in the case of *Cal and Glover, M. 10 Jac. (a)* that the king is not thereby restrained from granting dispensations; but that his authority remains full and perfect as before, and he may still grant them as king; for all acts of justice and grace flow from him. Before which time, the like had been declared, in the case of *Stranger and Holland, H. 39 Eliz. (x)* that the king by the prerogative he hath at common law, might grant such a dispensation as was then under debate, namely, to hold a benefice in commendam without the archbishop; this statute only transferring the authority of the bishop of Rome to the archbishop, but not intending to take away from the king (who is not named in the statute) the ancient prerogative of the crown. Which resolution is more distinctly delivered by *Moore*; that in cases where the archbishop had not authority given him by this statute, the king might grant dispensations as the pope had done, because the papal authority was transferred to the crown; but that all dispensations which this statute enables the archbishop to grant, are necessarily to be passed in the form directed by the statute. Since both which cases, it hath been delivered, in the case of *Evans and Aschurst, (Palmer. 457.)* that this statute gives the archbishop a power concurrent with the power which the king had and still hath at common law; and that a dispensation granted by the king, or by the archbishop, is good; and altho' this, as the other two, is delivered in the case of a commendam, yet this declaration of a power in the king, notwithstanding the negative clause in the statute, seems to be general as to all other dispensations. [How justly or reasonably

(a) *Hob. 146.*

(x) *Cro. Eliz. 542, 601. Moore 542.*

delivered, Dr. Gibson says, he will not pretend to affirm.] *Gibf.* 88.

After due examination] After which, if the archbishop affirm the cause just, there shall be no exception or averment by the court or by the party against it. But in case he deny to dispense with any person, who upon a good, just and reasonable cause ought to have a dispensation; a remedy is provided in the following part of the act. *Hob.* 158.

Inrolled in the chancery] Which inrollment is not a necessary condition, so as to render the dispensation null without it; but the neglect is a contempt in the clerk; who also ought to enter it at length in a roll, and not a paper book or by way of memorandum. *Dyer.* 233. *Mo.* 447.

After solemnization of any marriage to be had by virtue of such licences or dispensations] And by the marriage act of the 26 G. 2. c. 33. the archbishop of Canterbury's right of granting special licences of marriage is particularly reserved to him.

Customable dispensations] Among these is the right of conferring degrees of all kinds, for which faculties had been customarily grantable, and which this act hath vested in the archbishop of Canterbury. Which power, as it hath not been abrogated, or touched, by any succeeding law, so it hath been exercised by the succeeding archbishops, as a right vested in their see by no less than parliamentary authority; to which authority, as conveyed by the act, special reference is made in the body of every faculty that is granted upon this head. *Gibf.* 91. (y)

Or to any bishop of this realm] The canonists are much divided about the power of bishops in the point of dispensing; but the Gloss says, the more common opinion is, that a bishop may dispense wheresoever it is not found to be prohibited; and, generally, wheresoever a dispensation is not

(y) But although the archbishop can confer all the degrees which are taken in the universities, yet the graduates of the two universities, by various acts of parliament, and other regulations, are entitled to many privileges which are not extended to what is called a Lambeth degree: as for instance, those degrees which are a qualification for a dispensation to hold two livings, are confined, by 21 H. 8. c. 13. § 23, to the two universities. 1 Bl. Com. 381. *Ed. Christ.* n. 14. And though the archbishop have authority to grant dispensations to hold two livings, they must be confirmed under the great seal. 16. r. 13, and 25 H. 8. c. 21. § 11. *supra.*

prohibited, it is understood to be permitted: which dispensations seem to refer chiefly to canonical defects, and irregularities of that kind. Gibf. 92.

By the several stamp acts; every dispensation or faculty from the archbishop of Canterbury, or master of the faculties, shall be on a four times 40s stamp. (x)

Dissenters.

I. Laws against dissenters.

II. How far mitigated by the act of toleration, and other acts.

I. Laws against dissenters (a).

Canon.

1. *Can. 9.* **W**hoever shall separate themselves from the communion of saints, as it is approved by the apostles rules, in the church of England; and combine

(x) By subsequent stamp acts in all 101.

(a) The laws against dissenters may appear to some to be too severe, even after the mitigation which they have undergone by the act of toleration. But the necessity of supporting an established religion, whose tenets are friendly to the constitution of the state, has been felt in every period of our history. In 1643, an ordinance enjoined the taking of the solemn league and covenant throughout England and Wales, and other acts disabled persons not taking it to be of the common council, or to fill any office of trust in the city of London, or to practise, or solicit, in any of the courts of law. See the table prefixed to the collection of *Scobel*. On the 10th of June 1643, the archbishop of Canterbury was suspended, and his temporalities sequestered. *Scob. 42.* Shortly after, the *Directory* was ordered to be used in place of the Book of Common Prayer, and severe penalties were imposed on such as used the latter, even in private. And lastly, the archbishops and bishops were abolished, and their lands settled in trustees, and sold; and classical presbyteries and congregational elder-ships were established in their place. *Ib. 75, 97, 99, 101, 139, 165.* The toleration act, on the contrary, affords protection to dissenting ministers who have complied with the requisites of the law, and permits to them and their congregations the

bine themselves together in a new brotherhood; accounting the christians who are conformable to the doctrine, government, rites and ceremonies of the church of England, to be profane and unmeet for them to join with in christian profession: let them be excommunicated *ipso facto*, and not restored but by the archbishop, after their repentance and publick revocation of such their wicked errors.

Can. 10. Whoever shall affirm, that such ministers as refuse to subscribe to the form and manner of God's worship in the church of England prescribed in the communion book, and their adherents, may truly take unto them the name of another church not established by law; and dare presume to publish it, that this their pretended church hath of long time groaned under the burden of certain grievances imposed upon it, and upon the members thereof before mentioned, by the church of England, and the orders and constitutions therein by law established: let them be excommunicated, and not restored until they repent, and publicly revoke such their wicked errors.

Can. 11. Whoever shall affirm or maintain, that there are within this realm other meetings, assemblies or congregations of the king's born subjects, than such as by the laws of this land are held and allowed, which may rightly challenge to themselves the name of true and lawful churches: let them be excommunicated, and not restored but by the archbishop, after his repentance and publick revocation of such his wicked errors.

Can. 12. Whoever shall affirm, that it is lawful for any sort of ministers and lay persons, or either of them, to join together, and make rules, orders, or constitutions in causes ecclesiastical, without the king's authority, and shall submit themselves to be ruled and governed by them: let them be excommunicated *ipso facto*, and not be restored until they repent, and publicly revoke those their wicked and anabaptistical errors.

Can. 71. No minister shall preach or administer the holy communion in any private house; except it be in times of necessity, when any being either so impotent, as he

the free exercise of their religion. The courts of law will also assist them, according to the circumstances of their case, in obtaining admission to their offices, or recovering the possession of them, where they have been unjustly deprived. See *Infra* II. The exposition of 1 W. c. 18. s. 11.

cannot go to the church, or very dangerously sick, is desirous to be partaker of the holy sacrament: upon pain of suspension for the first offence, and excommunication for the second. Provided, that houses are here reputed for private houses, wherein are no chapels dedicated and allowed by the ecclesiastical laws of this realm. And provided also, under the pains before expressed, that no chaplains do preach or administer the communion in any other places, but in the chapels of the said houses; and also that they do the same very seldom upon Sundays and holidays: so that both the lords and masters of the said houses, and their families, shall at other times resort to their own parish churches, and there receive the holy communion at the least once every year.

Can. 72. No minister or ministers shall, without the licence and direction of the bishop first obtained under his hand and seal, appoint or keep any solemn fasts, either publicly or in any private houses, other than such as by law are, or by publick authority shall be appointed; nor shall be wittingly present at any of them: under pain of suspension for the first fault, of excommunication for the second, and of deposition from the ministry for the third. Neither shall any minister, not licensed as is aforesaid, presume to appoint or hold any meetings for sermons, commonly termed by some prophecies or exercises, in market towns or other places; under the said pains: nor without such licence to attempt, upon any pretence whatsoever, either of possession or obsession, by fasting and prayer, to cast out any devil or devils; under pain of the imputation of imposture or cozenage, and deposition from the ministry.

Can. 73. Forasmuch as all conventicles and secret meetings of priests and ministers, have ever been justly accounted very hurtful to the state of the church wherein they live; we do ordain, that no priests or ministers of the word of God, nor any other persons, shall meet together in any private house, or elsewhere, to consult upon any matter or course to be taken by them, or upon their motion or direction by any other, which may any way tend to the impeaching or depraving of the doctrine of the church of England, or of the Book of Common Prayer, or of any part of the government and discipline now established in the church of England; under pain of excommunication *ipso facto*.

Not resorting
to church.

2. By the 1 *El.* 2. All persons shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour

endeavour themselves to resort to their parish church or chapel accustomed, or upon reasonable let thereof to some usual place where common prayer and such service of God shall be used in such time of let, upon every Sunday and other days ordained and used to be kept as holidays, and then and there to abide orderly and soberly, during the time of the common prayer, preaching, or other service of God there to be used and ministered; on pain of punishment by the censures of the church, and also on pain of forfeiting 12d for every such offence, to be levied by the churchwardens to the use of the poor, of the goods, lands and tenements of such offender by way of distress. *f. 14.*

And by the 23 *El. c. 1.* Every person, above the age of sixteen years, which shall not repair to some church, chapel, or usual place of common prayer, but forbear the same contrary to the 1 *El. c. 2.* shall forfeit 20l a month; and if he shall forbear the same for twelve months, he shall, after certificate thereof made in writing into the court of king's bench, by the ordinary of the diocese, a judge of assize, or justice of the peace of the county where the offender shall dwell, be bound with two sureties in 200l at least to the good behaviour, and so to continue bound until he do conform. *f. 5.*

And if any person or persons, body politick or corporate, shall keep or maintain any schoolmaster which shall not repair to church as is aforesaid, or be allowed by the bishop or ordinary of the diocese; they shall forfeit 10l a month. Provided, that no such ordinary, or their ministers, shall take any thing for the said allowance. And such schoolmaster or teacher presuming to teach contrary to this act, shall be disabled to be a teacher of youth, and be imprisoned for a year. *f. 6, 7.*

And by the 29 *El. c. 6.* Every such offender, in not repairing to divine service, but forbearing the same contrary to the 23 *El. c. 1.* as shall thereof be once convicted, shall for every month afterwards until he do conform, pay into the exchequer, without any other indictment or conviction, in every easter and michaelmas term, as much as shall then remain unpaid after such rate of 20l a month; and if default shall be made in any part of the payment thereof, the queen may, by process out of the exchequer, seize all the goods and two parts of the lands of such offender. *f. 4. 6.*

And

And by the 3 *Ja. c. 4.* The king may refuse the 20 l a month, and take two parts of the lands at his option. *f. 11.*

And every person who shall willingly maintain, retain, relieve, keep or harbour in his house, any servant, sojourner or stranger, who shall not repair to church, but shall forbear the same for a month together, not having any reasonable excuse; shall forfeit 10 l a month. *f. 32.*

And every person who shall retain or keep in his service, fee or livery, any person who shall not repair to church, but shall forbear the same for a month together; shall for every month he shall so retain, keep or continue in his service, fee or livery, any such person so forbearing, knowing the same, forfeit 10 l. *f. 33.*

Provided that this shall not extend to punish or impeach any person, for keeping his father or mother, wanting (without fraud or covin) other habitation, or sufficient maintenance. *f. 34.*

And by the 21 *Ja. c. 4.* Actions against persons for not frequenting the church and hearing divine service, shall be laid in any county at the pleasure of the informer. *f. 5.*

Frequenting
conventicles.

3. By the 35 *El. c. 1.* If any person above the age of sixteen years, which shall obstinately refuse to repair to some church, chapel or usual place of common prayer, to hear divine service, and shall forbear the same by the space of a month next after without any lawful cause, shall, by printing, writing, or express words or speeches, advisedly or purposely practise or go about to move or persuade any person to deny, withstand or impugn her majesty's power and authority in causes ecclesiastical, united and annexed to the imperial crown of this realm; or to that end or purpose shall advisedly and maliciously move or persuade any person to forbear or abstain from coming to church to hear divine service or to receive the communion, or to be present at any unlawful assemblies, conventicles or meetings, under colour or pretence of any such exercise of religion; he shall be committed to prison until he shall conform to go to church, and make submission as hereafter is expressed. *f. 1.*

Provided, that if he shall not within three months after conviction so conform himself and make submission, being thereunto required by the bishop of the diocese, or a justice of the peace, or the minister or curate of the parish; then

then he shall, being thereunto warned or required by a justice of the peace, upon his corporal oath before the justices in sessions or at the assizes, abjure this realm of England and all other the queen's dominions for ever, unless her majesty shall license the party to return; and thereupon shall depart out of this realm at such have nor port, and within such time, as shall be assigned by the justices before whom the abjuration shall be made, unless he be letted or stayed by such lawful and reasonable causes as by the common laws of this realm are allowed in cases of abjuration for felony: and in such cases of let or stay, then within such reasonable and convenient time after, as the common law requireth in case of abjuration for felony: and the justices of the peace before whom the abjuration shall happen to be made, shall cause the same presently to be entered of record before them, and shall certify the same to the next assizes. s. 2.

And if he shall refuse to make abjuration, or after abjuration made shall not go to such haven and within such time as is before appointed, and from thence depart, or after departure shall return without her majesty's special licence; he shall be guilty of felony without benefit of clergy. s. 3.

But if he shall, before he be required to abjure, repair to some parish church on some Sunday or other festival day, and then and there hear divine service, and at service time before the sermon on reading of the gospel make publick and open submission and declaration of his conformity, he shall be discharged: Which submission shall be in this form, " I A. B. do humbly confess and acknowledge, that I have grievously offended God, in
 " contemning her majesty's godly and lawful government
 " and authority, by absenting myself from church, and
 " from hearing divine service, contrary to the godly laws
 " and statutes of this realm, and in using and frequenting
 " disorderd and unlawful conventicles and assemblies,
 " under pretence and colour of exercise of religion; and
 " I am heartily sorry for the same; and do acknowledge
 " and testify in my conscience, that no other person hath,
 " or ought to have, any power or authority over her majesty; and I do promise and protest, without any dissimulation, or any colour or means of any dispensation,
 " that from henceforth I will from time to time obey and
 " perform her majesty's laws and statutes, in repairing to
 " the church, and hearing divine service, and do my utmost
 " endeavour to maintain and defend the same."

Which

Dissenters.

Which submission and declaration the minister shall presently enter in a book to be kept in every parish for that purpose; and in ten days shall certify the same in writing to the bishop of the diocese. s. 4, 5, 6.

Provided, that if after submission such offender shall fall into relapse, or estoons obstinately refuse to repair to some church, chapel, or usual place of common prayer, to hear divine service, and shall forbear the same as aforesaid, or shall be present at any such assemblies, conventicles or meetings, under colour or pretence of any exercise of religion; he shall lose all benefit of his submission. s. 7.

All pains, duties, forfeitures, and payments on this act, and on the 23 *El.* c. 1. shall be recovered to her majesty's use in any of the courts of record at Westminster. s. 10.

Provided, that one third of the penalties by this act shall be employed to such charitable uses, and in such manner and form as is directed by the statute of the 29 *El.* c. 6. (that is, for the relief of the poor, as shall be directed by the lord treasurer, chancellor, and chief barons of the exchequer.) s. 11.

Provided, that no *papist* recusant, or feme covert, shall be compelled or bound to abjure by virtue of this act. s. 12.

Provided, that every person that shall abjure by this act, or refuse to abjure being thereunto required as aforesaid, shall forfeit to the queen all his goods and chattels forever, and his lands during life. s. 13.

And by the 17 *C.* 2. c. 2. All such persons as shall take upon them to preach in any unlawful assembly, conventicle or meeting, under colour or pretence of any exercise of religion, contrary to the laws and statutes of this kingdom; shall not, unless only in passing upon the road, come within five miles of any city or town corporate, or borough that sends burgesses to parliament; on pain of 40*l.*, one third to the king, one third to the poor, and one third to him that shall sue in any court of record at Westminster, or at the assizes or sessions. s. 3.

And it shall not be lawful for any person so restrained, or for any other person that shall not frequent divine service established by the laws of the kingdom and carry himself reverently, decently, and orderly there; to teach any public or private school, or take any boarders or tablers that are taught or instructed by himself or any other; on the like pain of 40*l.* s. 4.

Provided,

Provided, that if any such person shall without fraud be served with any writ, subpœna, warrant, or other process, whereby his personal attendance is required; his obedience thereunto shall not be construed an offence against this act. s. 6.

And by the 22 C. 2. c. 1. If any person of the age of sixteen years or upwards, being a subject of this realm, shall be present at any assembly, conventicle or meeting, under colour or pretence of any exercise of religion, in other manner than according to the liturgy and practice of the church of England, at which there shall be five persons or more assembled together, besides those of the household if it be in a house where there is a family; or if it be in a house, field, or place where there is no family inhabiting, then where any five persons or more are so assembled as aforesaid: it shall be lawful for any one or more justices of the peace, or chief magistrate of the place, and they are hereby required and enjoined, on proof to them made of such offence, either by confession of the party, or oath of two witnesses, or by notorious evidence and circumstance of the fact, to make a record of every such offence under hand and seal; which record shall be a full conviction of every such offender; and thereupon they shall impose on every such offender a fine of 5s for such first offence: which record and conviction shall be certified to the next sessions. s. 1.

For the second offence, every such offender shall incur the penalty of 10s. Which fines for the first and every other offence shall be levied by distress and sale of the offender's goods; or in case of the poverty of such offender, upon the goods of any other person who shall be then convicted of the like offence at the same conventicle, at the discretion of such justice or chief magistrate; so as the sum to be levied on any one person in case of the poverty of other offenders, amount not in the whole to above the sum of 10l upon the occasion of any one meeting: and the constables, churchwardens, and overseers of the poor respectively, shall levy the same accordingly, by warrant of such justice or chief magistrate; and the same so levied shall be forthwith delivered to such justice or chief magistrate, and by him distributed, one third to the sheriff at the quarter sessions for the king's use, one third to the poor, and one third to the informer and to such person and persons as such justice or chief magistrate shall appoint, having regard to their diligence and industry in discovering,

discovering, dispersing, and punishing of the said conventicles. s. 2.

And every person who shall take upon him to preach or teach in any such meeting, assembly or conventicle, and shall thereof be convicted as aforesaid; shall forfeit for such first offence 20l, to be levied and disposed of in manner aforesaid: and if the said preacher or teacher so convicted be a stranger, and his name and habitation not known, or is fled and cannot be found, or in the judgment of such chief magistrate shall be thought unable to pay the same; they shall levy the same by their warrant upon the goods of any such persons who shall be present at the same conventicle: and for every other offence 40l in like manner. s. 3.

And every person who shall wittingly and willingly suffer any such conventicle, meeting or unlawful assembly aforesaid, to be held in his house, out-house, barn, yard, or backside, and be convicted thereof in manner aforesaid; shall forfeit 20l, to be levied in manner aforesaid upon his goods, or in case of his poverty or inability as aforesaid, upon the goods of such persons who shall be convicted in manner aforesaid of being present at the same conventicle: and the money so levied to be disposed in manner aforesaid. s. 4.

Provided, that no person shall by any clause of this act be liable to pay above 10l for any one meeting, in regard of the poverty of any other persons. s. 5.

Provided, that in all cases of this act, where the penalty or sum charged upon any offender exceeds the sum of 10s, and such offender shall find himself aggrieved, it shall be lawful for him, within one week after the said penalty or money charged shall be paid or levied, to appeal in writing from the person or persons convicting, to the judgment of the justices of the peace in their next quarter sessions; to whom the justice or justices, chief magistrate, or alderman, that first convicted such offender, shall return the money levied upon the appellant, and shall certify under his and their hands and seals the evidence upon which the conviction past, with the whole record thereof, and the said appeal: whereupon such offender may plead and make defence, and have his trial by a jury thereupon. And in case such appellant shall not prosecute with effect, or if upon such trial he shall not be acquitted, or judgment pass not for him upon his said appeal; the said justices at the sessions shall give treble costs against such offender for his

his unjust appeal. And no other court whatsoever shall intermeddle with any cause of appeal upon this act, but they shall be finally determined in the quarter sessions only. s. 6.

Provided, that upon the delivery of such appeal the appellant shall enter before the person convicting into a recognizance to prosecute the said appeal with effect; who shall also certify the same to such sessions: and if no such recognizance be entered into, the appeal shall be void. s. 7.

And every such appeal shall be left with the person convicting at the time of making thereof. s. 8.

And the justices of the peace and chief magistrates respectively, or constables by warrant from any such justice or chief magistrate, shall and may with what aid, force and assistance they shall think fit, for the better execution of this act, after refusal or denial to enter, break open and enter into any house or other place, where they shall be informed any such conventicle is or shall be held, as well within liberties as without; and take into their custody the persons there unlawfully assembled, to the intent they may be proceeded against according to this act: and the lieutenants or deputy lieutenants, or any commissioned officer of the militia or other of his majesty's forces, with such troops or companies of horse and foot; and also the sheriffs and other magistrates and ministers of justice, or any of them jointly or severally, with such other assistance as they shall think meet or can get in readiness with the soonest, on certificate made to them respectively under the hand and seal of any one justice or chief magistrate, of his particular information or knowledge of such unlawful meeting or conventicle held or to be held in their respective counties or places, and that he with such assistance as he can get together is not able to suppress and dissolve the same, —shall and may, and are hereby required and enjoined to repair unto the place where they are so held or to be held, and by the best means they can, to dissolve, dissipate or prevent all such unlawful meetings, and take into their custody such and so many of the said persons so unlawfully assembled as they shall think fit, to the intent they may be proceeded against according to this act. s. 9.

Provided, that no dwelling house of any peer of the realm, where he or his wife shall be then resident, shall be searched by virtue of this act, but by immediate warrant from his majesty under his sign manual, or in the presence of the lieutenant or a deputy lieutenant, or two justices of the peace, whereof one to be of the quorum. s. 10.

And

And if any constable, churchwarden, or overseer of the poor, who shall know or be credibly informed of any such meetings or conventicles held within his precincts, parishes or limits, and shall not give information thereof to some justice of the peace or the chief magistrate, and endeavour the conviction of the parties according to his duty; but such constable, churchwarden or overseer of the poor, or any person lawfully called in aid of the constable, shall wilfully and wittingly omit the performance of his duty in the execution of this act, and be thereof convicted in manner aforesaid; he shall forfeit 5*l*, to be levied and disposed as aforesaid: and if any justice of the peace or chief magistrate shall wilfully and wittingly omit the performance of his duty in the execution of this act; he shall forfeit 10*l*, half to the informer, to be recovered in any of his majesty's courts at Westminster. *s. 11.*

And if any person be at any time sued for putting in execution any of the powers contained in this act, otherwise than upon appeal allowed by this act; he may plead the general issue, and give the special matter in evidence: and if the plaintiff be nonsuit, or a verdict pass for the defendant, or if the plaintiff discontinue his action, or if upon demurrer judgment be given for the defendant, every such defendant shall have his full treble costs. *s. 12.*

And this act, and all clauses therein contained, shall be construed most largely and beneficially for the suppressing of conventicles, and for the justification and encouragement of all persons to be employed in the execution hereof: and no record, warrant, or mittimus to be made by virtue of this act, or any proceedings thereupon, shall be reversed, avoided, or any way impeached, by reason of any default in form. And in case any person offending against this act, shall be an inhabitant in any other county or corporation, or fly into another county or corporation, after the offence committed; the justice or chief magistrate before whom he shall be convicted as aforesaid, shall certify the same under his hand and seal, to any justice of the peace or chief magistrate of such other county or corporation wherein the said person is an inhabitant or is fled into, who shall levy the penalty as fully as the other justice might have done in case he had been an inhabitant where the offence was committed. *s. 13.*

Provided, that no person shall be punished for any offence against this act, unless he be prosecuted within three months after the offence committed. And no person who

shall be punished for any offence by virtue of this act, shall be punished for the same by virtue of any other act or law whatsoever. s. 14.

And the aldermen of London shall have the same power to execute this act there, as the justices of the peace elsewhere. s. 15.

If the person convicted as aforesaid be a feme covert, cohabiting with her husband; the penalties of 5s and 10s as aforesaid, shall be levied upon the goods of her husband. s. 16.

Provided, that no peer of the realm shall be attached or imprisoned by this act. s. 17.

Provided, that nothing in this act shall extend to invalidate or make void the king's supremacy in ecclesiastical affairs; but that he may exercise and enjoy all powers and authority in ecclesiastical affairs, as he might have done before. s. 18.

4. By the 13 & 14 C. 2. c. 4. No person shall pre-Sacrament;
sume to consecrate and administer the sacrament of the Lord's supper, before he shall be ordained priest according to the manner of the church of England; on pain of 100l, half to the king, and half to be equally divided between the poor and him who shall sue in any of his majesty's courts of record. s. 14.

And by the 13 C. 2. s. 2. c. 1. No person shall be placed, elected, or chosen, into the office of mayor, alderman, recorder, bailiff, town clerk, common council man, or other office of magistracy, or place of trust or other employment relating to or concerning the government of any of the cities, corporations, boroughs, cinque ports, and their members, and other port towns within this realm, that shall not have within one year next before such election or choice taken the sacrament of the Lord's supper, according to the rites of the church of England; and in default thereof, every such placing, election, and choice is hereby declared to be void. s. 12. (b)

5. By

(b) By 5 G. 1. c. 6. § 3. a prosecution upon this statute, to oust the party elected into a corporate office, must be commenced within six months after the election, and prosecuted without wilful delay; and the oath and declaration required by the stat. 13 C. 2. are repealed. The following cases have lately occurred upon this subject. *Rex v. Brown* and two others, 29 G. 3. B. R. A rule was obtained for an information
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Disability.

5. By the 3 *J. c.* 5. no recusant convict shall practise the common or civil law, or physic, nor shall be judge, minister,

in nature of *quo warranto* against the defendants, as common councilmen of *York*, to shew by what authority they claimed to be such; they not having received the sacrament within 12 months previous to their election, under 13 *Car. 2. s. 2. c. 1.* and the prosecution being commenced within six months after their election. Against the rule it was said, that if the court thought the granting of these informations was not *ex debito justitiæ*, but discretionary, no case could occur where that discretion might more properly be exercised than the present. For the necessity of the statute in question had long been done away, and the defendants, in this particular case, had been elected without their knowledge, and in their absence, so that they had no opportunity of going through the previous forms with a view to their elections, and by their affidavits they state unequivocally that they are members of the church of *England*. Applications of this sort are certainly to the discretion of the court, because the subject is obliged to ask leave of the court to file his information; and a refusal to grant leave on this ground will not operate as a repeal of the *stat. of Car.* because if any publick inconvenience is likely to arise from the omission in question, it is still open to the attorney-general to prosecute if he pleases. Besides it does not appear here, that the party making the application has any connection with the corporation, upon which ground the court refused to interfere in the case of the *King v. Stacy*, 1 *T. Rep.* 1.

Lord Kenyon, Cb. J. I think we are bound to grant this information. The law has said that the magistracy of the country shall be in the hands of those who profess the religion of the church of *England*. This law has been revised and softened down, since the accession of the house of *Hanover*; but we are now called upon to pare away the provisions of it, still more than the legislature have thought fit to do.

Ajiburst, J. When the application is made merely to disturb the local peace of corporations, it is right to inquire into the motives of the party, to see how far he is connected with the corporation. But the ground on which this application is made, is to enforce a general act of parliament, which interests all the corporations in the kingdom, and therefore it is no objection that the party applying is not a member of the corporation. Another reason why we may more safely interfere in this case, is because this application does not tend to a dissolution of the corporation.

Buller and Grose, Justices, assenting, the rule was made absolute.

The

minister, clerk or steward, or other officer, in any court, or any officer in the army or navy; on pain of 100*l*, half to the

The *King against Smith*, *Hil. 30 G. 3.* A rule having been obtained to shew cause why an information in the nature of *quo warranto* should not be granted against the defendant to shew by what authority he claimed to be mayor of *Nottingham*, upon the ground of his not having taken the sacrament, according to the rites of the church of England, within one year next before his election. It was objected to the propriety of this application from the relators, that they were members of the corporation, who had concurred in the election of the defendant, and therefore ought not to be permitted to impeach it. But per *Lord Kenyon, Ch. J.* The rule under which the defendant attempts to shelter himself from the present application, holds very properly in cases where the electors concur in the election of the defendant, knowing of a defect in the form of conducting it: but this is a different case; here the defect is a latent one, arising from the omission of an act which the legislature have positively required to be done before any person is elected into a corporate office. And by the court the rule was made absolute. 3 *T. Rep.* 573, 574.

An information in the nature of a *quo warranto*, however, cannot be obtained except the defendant have actually entered upon his office; a mere *claim* of the franchise is not sufficient ground for such proceedings, though if the defendant refuse to take upon himself an office to which he has been duly elected, the court will perhaps grant a criminal information against him.

The *King against Whitwell*, *Mich. 33 G. 3.* 5 *T. Rep.* 85, was a rule for an information in the nature of a *quo warranto* against the defendant for claiming to be sheriff of *Coventry*, the objection to which was that he had not been sworn in, or done any act of office whatever.—In support of the rule it was said to be sufficient if a party *claimed* an office to which he had been elected. That in the present case it appeared from the affidavits that the defendant had been formerly elected to the office, and had tendered himself to be sworn in; but it was thought not expedient to administer the oath, inasmuch as he had not taken the sacrament within one year next before his election, pursuant to the 13 *Cb. 2. st. 2. c. 1.* That if this application should be refused, the consequence would be, that as the defendant insisted on his election, there could be no sheriff capable of acting for that city; for that the court would not grant a *mandamus* to the corporation to proceed to another election, unless there had been a mere colourable election, which could not be said to be the case here. That if the court were not now to interpose, the defendant would,

the king, and half to him that shall sue in any of the king's courts of record. s. 8.

Children.

6. By the 3 J. c. 5. If the children of any subject (the said children not being soldiers, mariners, merchants, or their apprentices or factors) shall, to prevent their good education in England, or for any other cause, be sent or go beyond seas, without licence of the king or six of the privy council (whereof the principal secretary to be one);

after the expiration of six months from the time of his election, take upon himself the actual exercise of the office, without receiving the sacrament; for that he would then be protected by the stat. 5 G. 1. c. 6. which enacts that the party shall incur no forfeiture, &c. unless the prosecution be commenced within six months after the election. It was added, that this application had been made in preference to one for a criminal information against the defendant, for not taking upon him the office which they feared would have been rejected, since that might have subjected him to the penalties of another law. But per *Buller, J.* (in the absence of *Lord Kenyon, Cb. J.*) No instance has been produced in which the court have granted an information in nature of *quo warranto*, where the party against whom it was applied for has not been in the actual possession of the office. No such instance can have happened; and all the cases cited are the other way. In *Rex v. Ponsonby*, *Say.* 245. 247. *Bull. N. P.* 211. the court expressly held that there must be a *user* as well as a *claim* in order to found such an application. This is evident from the very nature of the case. The defendant does not now claim to exercise his office of sheriff; he merely claims a right to take the oaths of office, in order that he may be invested with that corporate character. But until the oaths have been administered to him, he does not claim to exercise the office. It has been said that the court ought to grant this application, because it is the only remedy; for that, under these circumstances, they cannot grant a criminal information, or a *mandamus*. Whether they can interfere in the one or the other of those modes must depend upon the particular circumstances of the case, upon which they will decide when it is regularly brought before them; for the present it is sufficient to observe, that the court have granted criminal informations against persons for not taking upon them offices to which they have been legally elected. I remember the case of the *King v. Brown*, tried before me at Liverpool upon that very ground. But certainly the court cannot entertain such an application as the present, no *user* by the defendant having been pretended. *Mr. Justice Grose* concurring, the rule was discharged.

such

such child shall take no benefit by any gift, conveyance, descent, devise, or otherwise, of any lands or goods, until he conform. f. 16.

7. *Arundel.* It shall be publicly taught and preached by all, that in judicial matters; oaths may be lawfully taken. *Quakers is particular.*
Lind. 298.

Art. 39. As we confess, that vain and rash swearing is forbidden christian men by our Lord Jesus Christ, and James his apostle; so we judge, that christian religion doth not prohibit, but that a man may swear when the magistrate requireth, in a cause of faith and charity, so it be done according to the prophet's teaching, in justice, judgment, and truth.

The unlawfulness of taking an oath, though before a judge, was one of the tenets of the old anabaptists; against whom therefore first the foregoing constitution, and after that this article was made; long before the quakers had either name or being. But because they who at present go under the name of anabaptists have quitted the doctrine, and the people called quakers have taken it up, it is judged most proper to insert the same here, under the law relating to quakers. *Gibbs.* 510, 511.

Again; by the 5 *El. c.* 1. If any person shall refuse to take the oaths of allegiance and supremacy lawfully tendered, he shall incur a præmunire. f. 8.

And by the 13th & 14 *C. 2. c.* 1. Whereas certain persons, under the name of quakers and other names of separation, have taken up and maintained sundry dangerous opinions and tenets, and (amongst others) that the taking of an oath in any cause whatsoever, although before a lawful magistrate, is altogether unlawful, and contrary to the word of God; and the said persons do daily refuse to take an oath, though lawfully tendered, whereby it often happens that the truth is wholly suppressed, and the administration of justice much obstructed; and whereas the said persons, under pretence of religious worship, do often assemble themselves together in great numbers in several parts of this realm, to the great endangering of the publick peace and safety, and to the terror of the people, by maintaining a secret and strict correspondence amongst themselves, and in the mean time separating and dividing themselves from the rest of his majesty's good and loyal subjects, and from the public congregations and usual places of divine worship: for the redressing therefore, and preventing the many mischiefs and dangers that may arise by such dangerous tenets and such unlawful assemblies, it is enacted, that

Dissenters.

if any person who maintaineth that the taking of an oath in any case whatsoever (although before a lawful magistrate) is altogether unlawful and contrary to the word of God, shall wilfully and obstinately refuse to take an oath, where by the laws of the realm he shall be bound to take the same, being lawfully and duly tendred; or shall endeavour to persuade any other person to whom any such oath shall in like manner be duly and lawfully tendred, to refuse and forbear the taking of the same; or shall by printing, writing, or otherwise, go about to maintain and defend, that the taking of an oath in any case whatsoever is altogether unlawful: and if the said persons commonly called quakers, shall depart from the places of their several habitations, and assemble themselves to the number of five or more, of the age of sixteen years or upwards, at any one time in any one place, under pretence of joining in religious worship, not authorized by the laws of this realm:—In every such case the party so offending, being convicted by verdict of twelve men, or confession, or by the notorious evidence of the fact, shall forfeit to the king for the first offence a sum not exceeding 5*l*, for the second offence a sum not exceeding 10*l*, to be levied by distress and sale by warrant of the parties before whom the offender shall be convicted; and for want of such distress or non-payment of the penalty within one week of the conviction, the said party shall for the first offence be committed to the common gaol or house of correction for the space of three months, and for the second offence during six months, there to be kept to hard labour: which said penalties shall be employed for the increase of the stock of the house of correction to which they shall be committed, and providing materials to set them on work: and for the third offence, every such person shall abjure the realm; or otherwise his majesty may order him to be transported to any of his majesty's plantations beyond the seas. s. 1, 2.

And the justices of assize, and justices of the peace, in their open and general sessions, shall have power to inquire of, hear, and determine the same, and make process for the execution thereof, as they may do in cases of trespass. s. 3.

And any justice of the peace, or mayor of a corporation, may commit to the common gaol, or bind over with sufficient sureties to the quarter sessions, any person offending in the premises, in order to his conviction. s. 4.

Provided, that if any person after conviction shall take such oaths for which he stands committed, and shall also give security

security that he will forbear to meet in any such unlawful assembly; he shall be discharged. f. 5.

8. The tenets of the old anabaptists were, that infants ought not to be baptized; and if they be baptized, that they ought to be rebaptized when they come to lawful age; that it is not lawful for a christian man to bear office or rule in the commonwealth; that no man's laws ought to be obeyed; that it is not lawful for a christian man to take an oath before any judge; that Christ took no bodily substance of the blessed virgin; that sinners after baptism cannot be restored by repentance; that all things be or ought to be common, and nothing several: all which were excepted out of the general pardons of the 32 H. 8. c. 49. and the 3 & 4 Ed. 6. c. 24. Anabaptists in particular.

Art. 16 Not every deadly sin willingly committed after baptism, is sin against the Holy Ghost and unpardonable. Wherefore the grant of repentance is not to be denied to such as fall into sin after baptism. After we have received the Holy Ghost, we may depart from grace given and fall into sin, and by the grace of God we may arise again, and amend our lives. And therefore they are to be condemned, which say they can no more sin as long as they live here, or deny the place of forgiveness to such as truly repent.

Art. 27. The baptism of young children is in any wise to be retained in the church, as most agreeable to the institution of Christ.

Preface to the book of Common Prayer. It was thought convenient, that an office should be added for the baptism of such as are of riper years; which altho' not so necessary when the former book was compiled, yet by the growth of anabaptism, through the licentiousness of the late times crept amongst us, it is now become necessary.

Art. 37. The laws of the realm may punish christian men with death, for heinous and grievous offences.

And by the same *article*; It is lawful for christian men, at the commandment of the magistrate, to wear weapons, and serve in the wars.

Art. 38. The riches and goods of christians are not common, as touching the right, title, and possession of the same, as certain anabaptists do falsely boast. Notwithstanding, every man ought, of such things as he possesseth, liberally to give alms to the poor, according to his ability.

II. *How far mitigated by the act of toleration, and other acts.*

By the 1 W. c. 18. it is enacted as followeth :

Forasmuch as some ease to scrupulous consciences in the exercise of religion, may be an effectual means to unite their majesties protestant subjects in interest and affection; it is enacted, that neither the statute of the 23 El. c. 1. nor the statute of the 29 El. c. 6. nor the 1 El. c. 2. s. 14. nor the 3 J. c. 4. nor the 3 J. c. 5. nor any other law or statute of this realm made against papists or popish recusants (except the 25 Car. 2. c. 2. and the 30 Car. 2. st. 2. c. 1.) shall be construed to extend to any person dissenting from the church of England, that shall take the oaths of allegiance and supremacy, and make and subscribe the declaration against popery of the 30 Car. 2. st. 2. c. 1. Which oaths and declaration the justices of the peace at the general sessions of the peace to be held for the county or place where such person shall live, are hereby required to tender and administer to such persons as shall offer themselves to take, make, and subscribe the same, and thereof to keep a register : and none of the persons aforesaid shall give or pay, as any fee or reward, to any officer or officers belonging to the court aforesaid, above the sum of 6d, nor that more than once, for the entering of his taking the said oaths and making and subscribing the said declaration ; nor above the further sum of 6d for any certificate of the same to be made out and signed by the officers of the said court. s. 1, 2.

And all and every person and persons that shall as aforesaid take the oaths, and make and subscribe the said declaration, shall not be liable to any pains, penalties, or forfeitures mentioned in the 35 El. c. 1. nor in the 22 Car. 2. c. 1. nor shall any of the said persons be prosecuted in any ecclesiastical court, for or by reason of their non-conforming to the church of England. s. 4.

Provided, that if any assembly of persons dissenting from the church of England shall be had in any place for religious worship, with the doors locked, barred, or bolted, during any time of such meeting together ; all and every person and persons that shall come to and be at such meeting shall not receive any benefit from this law, but be liable to all the pains and penalties of all the foregoing laws recited in this act, for such their meeting, notwithstanding his taking the oaths, and his making and subscribing the declaration aforesaid. s. 5.

*Provided, that nothing herein contained shall be construed to exempt any of the persons aforesaid from paying of tithes or
other*

other parochial duties, or any other duties to the church or minister; nor from any prosecution in any ecclesiastical court, or elsewhere, for the same. §. 6.

And if any person dissenting from the church of England as aforesaid, shall be chosen or otherwise appointed to bear the office of high constable, or petty constable, churchwarden, overseer of the poor, or any other parochial or ward office, and such person shall scruple to take upon him any of the said offices in regard of the oaths, or any other matter or thing required by the law to be taken or done in respect of such office; every such person shall and may execute such office or employment by a sufficient deputy by him to be provided, that shall comply with the laws on this behalf. Provided always, the said deputy be allowed and approved by such person or persons, in such manner as such officer or officers respectively should by law have been allowed and approved. §. 7.

And no person dissenting from the church of England, in holy orders, or pretended holy orders, or pretending to holy orders, nor any preacher or teacher of any congregation of dissenting protestants, that shall make and subscribe the declaration aforesaid, and take the said oaths at the general or quarter sessions of the peace to be held for the county, town, parts or division where such person lives, and shall also declare his approbation of and subscribe the articles of religion mentioned in the statute of the 13 Eliz. c. 12. except the 34th, 35th, and 36th, and these words of the 20th article, viz. [the church hath power to decree rites or ceremonies, and authority in controversies of faith, and yet] shall be liable to any of the pains or penalties of the 17 C. 2. c. 2. nor the penalties mentioned in the said act of the 22 C. 2. c. 1. by reason of preaching at any exercise of religion; nor to the penalty of 100l by the 13 & 14 C. 2. c. 4. for officiating in any congregation for the exercise of religion permitted and allowed by this act. §. 8.

Provided always, that the making and subscribing the said declaration, and the taking the said oaths, and making the declaration of approbation and subscription to the said articles, in manner as aforesaid, at such general or quarter sessions of the peace, shall be then and there entered of record in the said court, for which 6d shall be paid to the clerk of the peace, and no more: provided, that such person shall not at any time preach in any place, but with the doors not locked, barred, or bolted as aforesaid. §. 9.

And whereas some dissenting protestants scruple the baptizing of infants; it is enacted, that every person in pretended holy orders, or pretending to holy orders, or preacher or teacher,

that shall subscribe the *aforesaid* articles of religion, except before excepted, and also except part of the 27th article touching infant baptism, and shall take the said oaths, and make and subscribe the said declaration, in manner *aforesaid*, shall enjoy all the privileges benefits and advantages which any other dissenting minister as *aforesaid* might have or enjoy by virtue of this act. s. 10.

And every teacher or preacher in holy orders, or pretended holy orders, that is a minister, preacher, or teacher of a congregation, that shall take the oaths herein required, and make and subscribe the declaration *aforesaid*, and also subscribe such of the *aforesaid* articles of the church of England as are required by this act in manner *aforesaid*, shall be thenceforth exempted from serving on any jury, or from being chosen or appointed to bear the office of churchwarden, overseer of the poor, or any other parochial or ward office, or other office in any hundred of any shire, city, town, parish, division, or wapentake. s. 11.

And every justice of the peace may at any time require any person that goes to any meeting for exercise of religion, to make and subscribe the declaration *aforesaid*, and also to take the said oaths, (or declaration of fidelity herein after mentioned, in case such person scruples the taking of an oath,) and upon refusal thereof, he shall commit him to prison without bail, and certify his name to the next session to be held for that place where such person then resides; and if he shall there upon a second tender refuse to make and subscribe the declaration *aforesaid*, he shall be then and there recorded and from thenceforth taken for a popish recusant convict, and incur all the penalties of all the *aforesaid* laws. s. 12.

And whereas there are certain other persons, dissenters from the church of England, who scruple the taking of any oath; it is enacted, that every such person shall make and subscribe the declaration *aforesaid*, and also a declaration of fidelity, and subscribe a profession of their christian belief. Which declarations and subscription shall be made and entered of record at the general quarter sessions of the peace for the place where such person resides. And every such person that shall make and subscribe the two declarations and profession *aforesaid*, being thereunto required, shall be exempted from all the pains and penalties of all the *aforesaid* statutes made against popish recusants or protestant non-conformists, and also from the penalties of the 5 El. c. 1. and 13 & 14 C. 2 c. 1. concerning the taking of oaths; and shall enjoy all other the benefits, privileges, and advantages, under the like limitations, provisos, and conditions, which any other dissenters should or ought to enjoy by virtue of this act. s. 13.

And

And if any person shall refuse to take the said oaths, when tendered to him, which every justice of the peace is hereby empowered to do; such person shall not be admitted to make and subscribe the two declarations aforesaid, tho' required thereunto either before a justice of the peace, or at the sessions before or after any conviction of popish recusancy as aforesaid, unless such person can, within thirty-one days after such tender of the declarations to him, produce two sufficient protestant witnesses to testify upon oath that they believe him to be a protestant dissenter, or a certificate under the hands of four protestants who are conformable to the church of England, or have taken the oaths and subscribed the declaration above mentioned, and shall also produce a certificate under the hands and seals of six or more sufficient men of the congregation to which he belongs, owning him for one of them. § 14.

Provided, that until such certificate under the hands of six of his congregation as aforesaid be produced, and two protestant witnesses come to attest his being a protestant dissenter, or a certificate under the hands of four protestants as aforesaid be produced, the justice shall take a recognizance with two sureties in the penal sum of 50*l.* for his producing the same; and if he cannot give such security, shall commit him to prison until he hath produced such certificates, or two witnesses as aforesaid. § 15.

Provided always, that all the laws made and provided for the frequenting of divine service on the Lord's day, shall be still in force, and executed against all persons that offend against the said laws, except such persons come to some congregation or assembly of religious worship, allowed or permitted by this act. § 16.

Provided, that nothing in this act shall be construed to extend to give any ease, benefit, or advantage to any papist or popish recusant whatsoever; or to any person that shall deny in his preaching or writing the doctrine of the blessed Trinity, as it is declared in the aforesaid articles of religion. § 17.

Provided, that if any person shall willingly and of purpose, maliciously or contemptuously come into any cathedral or parish church, chapel, or other congregation permitted by this act, and disquiet or disturb the same, or misuse any preacher or teacher; he shall upon proof thereof before any justice of the peace by two witnesses, find two sureties to be bound by recognizance in the penal sum of 50*l.* and in default of such sureties shall be committed to prison till the next sessions; and upon conviction of the said offence at the said sessions, shall suffer the pain and penalty of 20*l.* to the king. § 18.

Provided

the peace; and shall also before any justice of the peace of the county or place where he shall officiate, make and subscribe such declaration, and take such oaths as are mentioned in the said act, if thereunto required. s. 9.

S. 4. *All and every person and persons shall not be liable*] The sense in this, and in the following section where the same words are repeated, is evident enough; but it seemeth to be somewhat inaccurately expressed.

Shall not be liable to any pains, penalties, or forfeitures] And the law so far favours dissenters upon the foundation of this act, that charities are permitted to be established for the support of dissenting ministers. As in the case of the *Attorney General and Cock*, May 4, 1752. Anne Partridge by her will devised an annuity to the minister of a baptist meeting house in the parish of Hemel Hempstead. On an information in the name of the attorney general to establish this charity, it was urged that the act is not merely an act of toleration, but that it restores the common right of mankind to worship God according to their own conscience, and is agreeable to the policy of inviting people to come to trade and live here, and to the policy of every man's disposing of his own as he pleases. And the case of the *Attorney General and Andrews* was cited, 9 March, 1748, wherein copyhold lands, not surrendered to the use of the will, were devised for the benefit of quakers; and on a bill, the lord chancellor established it. On the other hand it was argued, that this court, before it interposes for a charity, will consider the nature of it, and not execute every charity, altho' made on religious principles. In the case of *Mendes D'Costa* against *D'Pays*, *Amb.* 228. Dec. 6, 1743, *Elias D'Pays*, a Jew, by his will ordered 1200l to be appropriated for an establishment of an assembly for the reading their holy and divine law for ever: and the lord chancellor held it an illegal charity, and such as this court would not enforce.—By Sir John Strange, master of the rolls, for the lord chancellor: This case is not now to be made a question. Baptists are persons the legislature looks upon as well as quakers. In the quakers case, the court went a great way, not only countenancing it as a good charitable use, but supplying the want of surrender to the use of the will. The Jew case was different: the lord chancellor held it an illegal charity, because it was not for the support or encouragement of any denomination of christians, but for the propagation of the Jewish law in contradiction to the christian religion, which is part of the

the law and constitution of this kingdom. 2 *Vezey*, 273. (c)

S. 8. *And shall also declare his approbation of, and subscribe the articles of religion*] And by the 19 G. 3. c. 44. intituled, "An act for the further relief of protestant dissenting ministers and schoolmasters," it is enacted, that every person dissenting from the church of England, in holy orders, or pretended holy orders, or pretending to holy orders, being a preacher or teacher of any congregation of dissenting protestants, who, if he scruples to declare his approbation of and subscribe the said articles of religion, shall take the oaths and make and subscribe the declaration against popery, required by the act of toleration, and sha'l also make and subscribe the following declaration, shall be intitled to all the privileges granted to protestant dissenting ministers by the said act of toleration; that is to say, *I A. B. do solemnly declare, in the presence of Almighty God, that I am a christian and a protestant, and as such, that I believe that the scriptures of the old and new testament, as commonly received among protestant churches, do contain the revealed will of God; and that I do receive the same as the rule of my doctrine and practice.* And the justices of the peace, at the general sessions where any protestant dissenting minister shall live, shall tender and administer to him the said last mentioned declaration; and he shall not pay to any officer of the court more than 6d. for his entry of such minister's making and subscribing the said last mentioned declaration, and taking the said oaths, and subscribing the declaration against popery, nor above 6d. for any certificate to be made out and signed by such officer. And every such person, qualifying himself as aforesaid, shall be exempted from serving in the militia.

And no dissenting minister, nor any other protestant dissenting from the church of England, who shall take the said oaths, and make and subscribe the said declaration against popery, and the declaration herein before

(c) See also *Att. Gen. v. Rance*, Amb. 422, where a bequest to the poor, by a French refugee, was ordered to be given to poor refugees; and *Waller v. Childs*, 1h. 524, where a legacy for the benefit of poor dissenting ministers of the gospel in any of the counties in England, was ordered to be paid to the respective treasurers of the different denominations of dissenters in the kingdom, for the support of the ministry in general.

mentioned, shall be prosecuted in any court whatsoever for teaching and instructing youth as a tutor or school-master: provided, that this shall not extend to enable any person dissenting from the church of England, to hold the mastership of any college or school of royal foundation, or of any other endowed college or school for the education of youth, unless the same shall have been founded since the first year of William and Mary, for the immediate use and benefit of protestant dissenters.

And whereas it hath been doubted whether the said act of toleration is a public or private act, it is hereby declared, that the said act, and also this present act, shall be deemed public acts, and judicially taken notice of as such, without specially pleading the same.

S. 11. *Preacher or teacher of a congregation*] And the law so far takes notice of them that a mandamus will issue to admit or restore them (d): As in the case of *K. and Barker*,

(d) A mandamus to admit and a mandamus to restore, are procured on very different grounds, as will appear by the following case; from which it may be inferred that the latter will not be granted except the party applying for it shew that he has been duly appointed to his office, and has a title to retain it, by having complied with the various regulations imposed by law.

The King against Jotham and others, Hil. 30 G. 3. 3 T. Rep. 575. A mandamus was applied for to the defendants, who were trustees of a dissenting meeting house at Bradford, in Wilts, called the Particular Baptists, to restore John Lloyd to the office of minister of the congregation, and to the use of the pulpit. This application was founded on the affidavits of Lloyd and Jotham, stating that in July 1787, Lloyd received an invitation from 27 persons of this meeting, on behalf of the whole congregation, to accept the office of minister; in consequence of which he procured his dismissal from another meeting of the same sect in Devonshire, and in December following publicly addressed the congregation of Bradford, and signified his acceptance of the office. That he had continued to officiate there as minister from that time till November last, when he received a paper from some part of the congregation, purporting to be a dismissal of him; that since that time the doors had been shut against him, and that he had been prevented from performing the functions of his ministry, although he had offered to answer any charges that could be brought against him. They further stated, that there was an endowment for the minister for the time being, of the meeting-house, and that the defendants were trustees for receiving

Barker, H. 2 G. 3. It was moved for a mandamus to be directed to the surviving trustees under a deed of release made

receiving the rents and profits thereof for that purpose; and Lloyd further deposed, that when he took upon himself the office of minister, he conceived that the congregation could not remove him, without his consent, unless he should misbehave himself, but that the appointment was for life: and that such was the understanding of other dissenting ministers of the same communion.

The counsel who shewed cause against the rule, stated from their affidavits, that Lloyd had behaved himself with great impropriety and profaneness, and had made his pulpit the vehicle of, personal slander on many of the congregation; in consequence of which a special meeting was held, when 55 of the congregation (which in the whole consisted of less than 100 members) agreed upon his dismissal, which was signified to him accordingly. And they stated an instance, 43 years ago, of a minister being dismissed from this meeting-house for immoral conduct. The affidavits further stated that Lloyd had not obtained a proper licence, as required by the act of parliament; and that amongst that sect it is held to be absolutely necessary, after a minister hath been chosen, that he should be ordained by the ministers of the Baptist church, who meet once a year for that and other purposes, with which form Lloyd had never complied after his election. This latter circumstance was insisted on by the counsel against the rule as a defect in Lloyd's title; and they also objected to the issuing of this mandamus, on the ground that he had not stated in his affidavit, that he had complied with the several regulations of the toleration act, by which dissenting ministers are required to subscribe the declaration therein contained, and such of the 39 articles as they do not dissent from; (or in lieu thereof the declaration contained in 19 G. 3. c. 44. *vide supra*.) In support of the rule it was contended, that it was not necessary in an application for a mandamus to state with so much precision that all these forms had been gone through: it was sufficient to state generally the title of the party making the application, and the wrong for which he seeks redress. Now the party states his election, and that he considered it as an appointment for life; but if there be any doubt, the court will give him an opportunity of trying the right which the congregation claim to dispossess him in the manner stated in the affidavits. In the case of the *King v. Barker* no other ground was laid for the mandamus but an affidavit of the endowment of the pastorate, the election of the claimant by a majority in whom the right to elect was vested, and his re-

made by one Charles Vinson to John Enty, a dissenting minister at Plymouth, and other trustees, settling a then new built meeting house upon the said trustees, in trust (among other things) to suffer the meeting house to be for the publick worship of God, by such congregation of protestant dissenters commonly called presbyterians, as should attend the ministry of the said Mr. Enty, or such other presbyterian minister as should in his room successively, in all times coming, be by the members in fellowship of the said or such like congregation regularly and fairly chosen and appointed to be the minister, preacher, or pastor, to preach in the said meeting; requiring them

removal from the possession by the trustees; and the court granted the mandamus. But by

Lord Knyon, Ch. J. There is no doubt but that a *mandamus* lies in these cases, where there is an endowment, if a proper case be made out. But it is necessary for the party applying for a *mandamus* to be restored to any office, to make out a *prima facie* title to such office, and shew at least that he has complied with all the forms necessary to constitute his right. Here it does not appear that the party applying has gone through all those ceremonies which the particular sect, of which he is a member, has made necessary. His lordship also seemed to think that the party applying should have shewn his compliance with the requisites of the toleration act.

Ashurst, J. thought the application not sufficiently founded, and that it was not enough for the complainant to state his *supposition* that he was elected for life; he ought to have shewn the grounds of it. And, in opposition to this, the other party has shewn an instance in which the congregation exercised the right of removing the minister.

Buller, J. The *King v. Barker* was the case of a *mandamus to admit*, and there is a great difference between that and a *mandamus to restore*. The former is granted merely to enable the party to try his right, without which he would be left without any legal remedy. But the court have always looked much more strictly to the right of the party applying for a *mandamus* to be restored. In these cases he must shew a *prima facie* title; for if he has been before regularly admitted, he may try his right by bringing an action for money had and received for the profits. Therefore, in order to entitle himself to this extraordinary remedy, he must lay such facts before the court as will warrant them in presuming that the right is in him, whereas here no facts have been stated to shew the ground of his title. Therefore, I am clearly of opinion, that this *mandamus* ought not to be granted. And *Grose, J.* concurring, the rule was discharged.

to admit Christopher Mends to the use of the pulpit thereof, as pastor, minister, or preacher there; he the said Christopher Mends being duly elected thereto. The counsel, on shewing cause against the mandamus, controverted by affidavits the election of Mends, and endeavoured to support the election of Mr. Hanmer, whom the trustees had put in possession. The majority of the congregation seemed to be on the side of Mends. The trustees espoused Hanmer, and meant to maintain him with an high hand. There was no colour for the election of Hanmer; and that of Mends was liable to objections. This contest had raised great animosity, especially in those who were for Hanmer; and as they thought their strength lay in throwing obstacles in the way of any (more especially a speedy) redress, as Hanmer was upholden and maintained in possession by the trustees; their counsel with great earnestness argued against making the rule absolute for a mandamus, and contended that it could not be to admit, when another was in possession. A mandamus to admit goes no further (they said) than to give a legal possession, where otherwise the party would be without remedy. A mandamus to admit is only to give a legal, not an actual possession; tho' in a mandamus to restore, the court will go further. But here another person (Mr. Hanmer) is in possession; and Mr. Mends never has been so. Here is no legal right. And this court cannot take notice of trusts, so as to give relief, upon an equitable title only; nor is this gentleman the *cestui que trust*: but, at most, his title is only equitable.—By lord Mansfield: A mandamus is a prerogative writ, to the aid of which the subject is intitled, upon a proper case previously shewn to the satisfaction of the court. It was introduced to prevent disorder from a failure of justice; and ought to be used upon all occasions, where the law has established no specific remedy, and where in justice and good government there ought to be one. Writs of mandamus have been granted to admit lecturers, clerks, sextons, and scavengers: to restore an alderman to precedency, an attorney to practise in an inferior court, and the like. Since the act of toleration, it ought to be extended to protect an endowed pastor of protestant dissenters from analogy and the reason of the thing. The right itself being recent, there can be no direct ancient precedent: but every case of a lecturer, preacher, schoolmaster, curate,

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chaplain, is in point. The deed is the foundation or endowment of the pastorate. The form of the instrument is necessarily by way of trust: for the meeting house, and the land upon which it stands, could not be limited to Enty and his successors. Many lectureships and other offices are endowed by trust deeds. The right to the function is the substance, and draws after it every thing else as appurtenant thereto. The power of the trustees is intirely in the nature of an authority to admit. The use of the meeting house and pulpit in this case follows, by necessary consequence, the right to the function of minister, preacher, or pastor; as much as the insignia do the office of a mayor, or the custody of the books that of a town-clerk.—The court proposed an issue to try, whether Mr. Hanmer was or was not duly elected; as the cheapest and best way to put it in. The defendants refused to have it so tried, and their counsel argued strenuously against granting a mandamus. They knew, the election of Hanmer could not be supported upon a trial. The election of Mends seemed liable to objection as irregular. But if the matter was proper for a mandamus, they were aware that in case neither was elected, the court would issue a mandamus to proceed to an election; in which case, the majority of the congregation were inclined to Mends. The trustees therefore obstinately persisted in opposing a mandamus and refusing a trial.—Lord Mansfield: Every reason concurs here for granting a mandamus. We have considered the matter fully; and we are all clearly for granting it. Here is a function, with emoluments; and no specific legal remedy. The right depends upon election; which interests all the voters. The question is of a nature to inflame men's passions. The refusal to try the election in a feigned issue, or proceed to a new election, proves a determined purpose of violence. Should the court deny this remedy, the congregation may be tempted to resist force with force. A dispute, "who shall preach christian charity," may raise implacable feuds and animosities, in breach of the public peace, to the reproach of government, and the scandal of religion. To deny this writ, would be putting protestant dissenters and their religious worship out of the protection of the law. This case is intitled to that protection; and cannot have it in any other mode, than by granting this writ. The defendants have refused either to go to a new election,

election, or to try it in a feigned issue. We were all of opinion, when a trial was proposed to them, that a mandamus ought to issue, in case of refusal.—Afterwards, the parties by agreement came to a new election; and a peremptory mandamus was issued by consent of both parties. *Bar. Mansf.* 1265.

S. 13. *Scruple the taking of any oath*] And by the 22 ^{Quakers.} G. 2. c. 46. In all cases wherein by any act of parliament an oath is or shall be allowed or required, the solemn affirmation of quakers shall be allowed instead of such oath, although no particular or express provision be made for that purpose in such act: and if any person making such affirmation shall be convicted of having wilfully, falsely, and corruptly affirmed or declared any thing, which if the same had been deposed upon oath would have amounted to wilful and corrupt perjury; he shall suffer as in cases of perjury. Provided, that no quaker shall by virtue hereof be qualified or permitted to give evidence in any criminal cases, or to serve on juries, or to bear any office of profit in the government. *f.* 36, 37.

But besides the quakers, there is another sect not un- ^{Moravians.} like to the quakers in this respect, called *Moravians*, who scrupling to take an oath have been indulged by the legislature in making a solemn affirmation instead thereof; it being enacted by the 22 G. 2. c. 30. (intituled, An act for encouraging the people known by the name of *Unitas fratrum*, or *united brethren*, to settle in his majesty's colonies in *America*) that every person being a member of the protestant episcopal church, known by the name of *Unitas fratrum*, or the *united brethren*, which church was formerly settled in *Moravia* and *Bohemia*, and are now in *Prussia*, *Poland*, *Silesia*, *Lusatia*, *Germany*, the *United Provinces*, and also in his majesty's dominions, who shall be required on any lawful occasion to take an oath, shall, instead of the usual form, be permitted to make his solemn affirmation, in these words, “*I A. B. do declare, in the presence of Almighty God, the witness of the truth of what I say.*” Which shall be of the same force and effect in all courts of justice and other places where by law an oath shall be required within the kingdoms of *Great Britain* and *Ireland*, and within his majesty's dominions in *America*, and under the like penalties as for perjury, as if such person had taken an oath in the usual form. But this not to qualify such person to give evidence in a criminal cause, or to serve on juries.—And by the said act, every member

of the said church or congregation, who shall reside in any of his majesty's dominions in *America*; and shall be summoned there to bear arms, shall be discharged from personal service, on paying the like rate or assessment in lieu thereof, as persons unable by reason of age, sex or other infirmity.—And to prevent any doubt, whether a person pretending to be of such congregation, is actually a member thereof; every person who shall claim any benefit of this act, shall at the time of such claim produce a certificate signed by some bishop of the said church, or by the pastor of such church or congregation who shall be nearest to the place where such claim is made: and such person proving by his affirmation, or by other legal witnesses, that the said certificate was duly executed, and also affirming that he is actually a member of the said church, shall be adjudged and deemed accordingly.—And that it may be known whether such bishops and pastors are of the said church; the advocate of the said church or congregation for the time being, shall from time to time lay before *The commissioners for trade and plantations*, in order that the same may remain in their office, lists of all the bishops of the said church appointed by them to grant certificates, with their hand writing and usual seal; and also the names, hand writing, and seals of the bishops appointed by the said brethren as aforesaid. and the names of such pastors as shall be authorized by the said advocate or bishops to give certificates in any of his majesty's colonies in *America*.

Declaration of fidelity, and subscribe a profession of their christian belief] The forms of which are inserted under the title *Oaths*.

Shall enjoy all other the benefits, privileges, and advantages, which any other dissenters should or ought to enjoy] And the rules of their discipline seem to be allowed, as in the case of marriages above mentioned, so also in other particulars: As in the case of *K. and Francis Hart, M. 3 G. 3.* On an indictment for a libel. The prosecutrix, Miss Mary Jerom, was educated among the quakers, at the town of Nottingham; her parents, who lived there, being of that persuasion. There are several separate congregations of quakers in and about this town; and once a month a general assembly is held of them all. At these monthly meetings, they take into consideration the conduct of each of their members, as have not acted conformably to their rules; and proceed according to the direction of our Sa-
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viour in the 18th chapter of St. Matthew, v. 15th, 16th, and 17th*, which they call their discipline. If gentle admonitions in private have no effect, complaint is made to the monthly meeting; from whence a deputation is formally sent, to visit, and to endeavour to reclaim the party offending. And if these steps prove ineffectual, they proceed at last to a final sentence of expulsion; which is usually by some instrument or paper in writing drawn up for that purpose, and openly read at one of the meetings for public worship. The person employed in this service is called the clerk of the meeting; and the writing by which the society exclude and disown as their member the delinquent, generally sets forth the cause of their proceeding, and the fruitless care and endeavours of the society to reclaim. This has been their general practice since the toleration act; and at Nottingham, as well as in many other places, they continue on this plan to this time. The prosecutrix having acted in disobedience to their rules, by frequenting places of public diversions, going into mourning for the death of a relation, and doing other things which they esteem unlawful: the method of admonition, and visitation by deputies, was taken by the society; and several conferences were had; but they proving ineffectual, and she absenting herself from their meetings, and declaring that she did not look upon herself as one of their body, the society at last (after several fruitless attempts to reclaim her for a year and a half) proceeded in their usual way to the sentence of expulsion in the following words, which were reduced into writing, approved of by the monthly meeting, and afterwards read by the defendant Francis Hart, as clerk of the meetings, at the close of their meeting for worship at Nottingham, on Sunday Sept. 6, 1761.

“Whereas Mary Jerom, of this town, was born of
“parents professing the same religious principles with us,
“and by them educated in our society; but not duly re-

• *If thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother.*

But if he will not hear thee, then take with thee one or two more; that in the mouth of two or three witnesses every word may be established.

And if he shall neglect to hear them, tell it unto the church: but if he neglect to hear the church, let him be unto thee as an heathen man and a publican.

“ garding the truth we profess, she imbibed erroneous
 “ notions contrary to scripture doctrine, and in divers
 “ parts of her conduct acted very inconsistently with a
 “ life of self-denial, and of late years mostly neglected
 “ meeting for divine worship, and when visited by friends
 “ appointed by our monthly meeting in love to her soul,
 “ and in order to reclaim her from error, and bring her to
 “ the acknowledgment of truth both in judgment and
 “ practice, but rejecting our labour of love, she declared
 “ that she did not look upon herself as a member of our
 “ society: we therefore hereby declare her not in unity
 “ with nor a member of our religious society, until by
 “ unfeigned repentance she duly acknowledge scripture
 “ doctrine, and behave agreeable to our holy profession;
 “ which that she may, we sincerely desire. Signed in and
 “ by order of our monthly meeting, held at Nottingham,
 “ the fifth of the eighth month, 1761. By Francis Hart,
 “ clerk.”

The prosecutrix being acquainted with this proceeding, sent her maid servant to the defendant for a copy of this sentence; who accordingly transcribed it, and inclosed it in a cover directed to Mary Jerom; who being thus possessed of it, annexed it to an affidavit, and applied to the court of king's bench for an information for a libel. But the court rejected the motion, and refused to grant a rule to shew cause. She afterwards, on the 12th of March 1762, preferred a bill of indictment against the defendant for a libel, before the grand jury at the assizes held for the town of Nottingham. Which bill being found by them was afterwards removed by certiorari into the king's bench. And the defendant having pleaded not guilty, it was tried before Mr. Justice Clive, at the summer assizes held for the town of Nottingham, July 30th 1762. The evidence on the part of the prosecution, was, the prosecutrix, and her servant maid who went for the paper; and the evidence of the publication of it as a libel was, the direction of it to the prosecutrix, and the defendant's acknowledgment to the maid that he read it at the meeting. The defendant's counsel called no witnesses; being of opinion, that the quakers, who were the only persons that could give an account of their method of proceeding, were disabled by the statute of 7 & 8 W. c. 34. from being witnesses on a criminal prosecution; and being restrained from arguing that the paper in question was no libel, by the judge, who said that such a question was more proper to be determined by the court above, could only insist, that the evidence
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on the part of the prosecution was not sufficient to maintain the indictment: The judge left the case, with its circumstances, to the jury; but rather recommended it to them to acquit the defendant. The jury, after withdrawing about three hours, found the defendant guilty. In the Michaelmas term following, Mr. Cust moved the court of king's bench for a new trial; and after stating the above-mentioned facts, and observing upon the circumstances of hardship which would attend the case on a motion in arrest of judgment, where no facts could be relied on but what appeared on the record, and after a verdict it might be presumed that a malicious intention to defame the prosecutrix (which was charged in the indictment) was proved, insisted that the leaving such a case as this to a jury, would be enabling a jury to set up a judgment in opposition to the legislature, and overturn the toleration act, and that therefore the verdict ought to be set aside as a verdict against law. The court was clearly of opinion, that the jury should have been directed to acquit the defendant; and, as notice of the motion was given, and counsel appeared for the prosecution, who did not contradict the above-mentioned facts, the court said they would not do so much credit to such a prosecution as to grant a rule to shew cause; and they ordered the verdict to be set aside, and a new trial to be had, on the first motion.

S. 16. *Except such persons come to some congregation*] But, by Holt chief justice: If a man be a professed churchman, and his conscience will permit him sometimes to go to meetings instead of coming to church, the act of toleration shall not excuse him; for it was not made for such sort of people. *Gibb. 521. 6 Mod. 190.*

And by the 5 G. 2. c. 4. If any mayor, bailiff, or other magistrate, shall knowingly or wilfully resort to, or be present at, any public meeting for religious worship, other than of the church of England, in the gown or other peculiar habit, or attended with the ensign or ensigns belonging to his office; he shall, upon conviction, by due course of law, be disabled to hold such office, and be incapable to bear any publick office or employment whatsoever (c).

(c) Sir Humphrey Edwin, a lord mayor of London, had the impudence, soon after the toleration act, to go to a presbyterian meeting-house in his formalities; which is alluded to by Dean Swift in his "Tale of a Tub," under the allegory of Jack getting on a great horse and eating custard. 4 *Bl. Com.* 53.

S. 18.

Dissenters.

S. 18. *Disquiet or disturb*] (f). And by the 1 G. 3. 2. c. 5. If any persons unlawfully, riotously, and tumultuously assemble together, to the disturbance of the publick peace, shall unlawfully and with force demolish or pull down, or begin to demolish or pull down any church or chapel, or any building for religious worship certified and registred according to the 1 W. c. 18. the same shall be adjudged felony without benefit of clergy. f. 4. And the hundred shall answer damages, as in cases of robbery. f. 6.

S. 19. *Place of such meeting shall be certified*] M. 8 W. Green and others against Pope. Green and fifteen others bring an action upon the case, in the court of common pleas, against the defendant, for having made a false return to a mandamus to him directed. The plaintiffs in their declaration shew the act of the 1 W. c. 18. which exempts protestant dissenters from the penalties of divers former acts, if they take the oaths and subscribe the declaration there mentioned; that by the same it is enacted, that no meeting by protestant dissenters for religious worship shall be allowed, until the place for the meeting be certified unto the bishop of the diocese, or the archdeacon, or to the quarter sessions, and registred or recorded there respectively; and the plaintiffs shew, that they were protestant dissenters, and had taken the oaths and subscribed the declaration according to the act; and that in the parish of Hindley at a town called D. within the diocese of Chester, the plaintiffs had appointed a place called *The chapel* for their religious worship, and that they had authority so to do: that Green, one of the plaintiffs, made a certificate of their appointment of this place to the bishop of Chester, and delivered it to Pope the defendant, being register to the bishop, to register it as he ought; that the defendant Pope refused to register it; upon which the plaintiffs were driven to sue a mandamus out of the king's bench, directed to the defendant, commanding him to register the certificate; but that the defendant notwithstanding did not register it, but made return to the mandamus, that Hindley was an ancient populous village, distant one

(f) The 18th section of this act inflicts a penalty of 20l. upon conviction *at the sessions*, but these words do not oust the court of king's bench of its jurisdiction. In *Rex v. Hubs and others*, an indictment on this act found at the quarter sessions was removed into the king's-bench, and each of several defendants were adjudged to pay the penalty of 20l. 5 T. Rep. 542.

mile

mile from the parish church, and for these forty years last past this place called *The chapel* had been and yet is a chapel of ease, and endowed with 50l a year, and had a minister appointed to officiate, and that there were several places within the parish already appointed for dissenters for religious worship; all which return the plaintiffs aver to be false; and for this false return they bring this action. The defendant pleads, that the return to the mandamus was true, and avers every particular of the return. The plaintiffs demur. And it was resolved by the court, that this plea was bad, because it amounts but to the general issue, it being all matter of fact, and having no intermixture of law. Then it was urged for the defendant, that judgment ought to be given for him, 1. Because it is said in the declaration, that the plaintiffs appointed the place, but the act gives no direction, who shall have authority to appoint the place, and therefore it ought rather to be done by the preacher, or otherwise with the consent of the whole meeting. 2. They have no authority to appoint a chapel; but this place in the declaration they call a chapel. But to this the court answered, that a field or tavern may be called a chapel. 3. They should have shewn, by whom this appointment was made, as by the dissenters inhabitants within such a district; but it is so general here, that it may be by all the dissenters in England. Then if it is no good appointment, the whole will fail; for then there will be no certificate; if no certificate, no registering; if no cause to register, the refusal was no ground for a mandamus; if no mandamus, then there could be no false return. 4. It is said that the certificate was made by Green alone; but the act gives no authority to any one in particular to make it. But by Treby, chief justice, the act being general, any of them may well certify. 5. The mandamus in this case was not grantable, for there was here no disturbance of a freehold, or office of trust, but a thing merely ecclesiastical: and if a man hath a seat in a church, and is hindred of the enjoyment, no mandamus lies; and as to the plaintiffs, this was in nature of a church. But to all these objections the court gave one general answer, that this action was brought for the false return to the mandamus, and therefore all the rest is but inducement: and therefore whether a mandamus will lie or not, is not now before the court, but it must be taken for granted, that a mandamus was issued, and the defendant made a false return. The principal point therefore of the case was, whether the plaintiffs can join in this action, or not? And this was several

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veral times argued at the bar. And the defendants counsel argued that they could not; because that where persons are jointly intitled to the action, they may all join in it, since the damages which were the foundation of it were joint, but where persons are severally damaged, as in trespass or the like, there they cannot join. But it was adjudged by the whole court upon great deliberation, that the plaintiffs might well join, for the damages in this case were joint; for they all jointly sue a mandamus, they all jointly prosecuted, the charges were all joint, and these are the damages the plaintiffs sue to recover; and by Treby chief justice, if the attorney sues the plaintiffs for the charges of the suit of the mandamus, he must sue them jointly, and the survivors are liable: and tho' it was objected, that the plaintiffs had no need to join in the suit of the mandamus; yet the court answered, since they might have done it, the charges will survive. And they relied principally upon a case adjudged in this court, *M. 4 W.* where the two churchwardens of Chelsea church, being elected by the parish by custom, went to Dr. Brampton the official, to be sworn; Dr. Brampton refused to administer the oath to them; upon which they sued a mandamus directed to Dr. Brampton, to command him to administer the oaths; upon which he returned, that the custom was, that the minister should name one churchwarden and that the parish should chuse the other; that because the parish had elected two, he did not know which of them he ought to admit; they brought an action upon the case jointly against Dr. Brampton for this false return; and exception was taken, that the damages were several, and the profits of the offices several; but to this it was answered, that the action was not brought to recover damages for the profits of the office, for the office had no profits; but it was brought to recover the damage and charges expended in the suit of the mandamus; and for this reason it was adjudged, that they might well join: which does not differ from the principal case. But to make a distinction between these two cases, it was objected, that the churchwardens might well join; because they are a corporation in judgment of law, and may sue for goods of the parish which are taken out of their possession, or may have trespass or appeal of robbery for the goods of the parish; which distinguishes them from this case, which was of common persons. But to this the court answered, that churchwardens are not a corporation, till they are admitted; but this mandamus was sued, to procure admittance, and consequently then they were not a corporation,

tion. And by the court, this action is not brought, only to recover damages, but also to have a peremptory mandamus, in which all ought to join. For one of them cannot have a peremptory mandamus, where sixteen joined in the principal mandamus; for the peremptory mandamus must pursue the principal. And for these reasons all the court were of opinion, that the plaintiffs might well join. And therefore judgment was given for the plaintiffs. Afterwards the plaintiffs moved the court of king's bench for a peremptory mandamus. But the court of king's bench denied to grant it; because the peremptory mandamus says, that the return is false *as it appeareth unto us by the record*, which cannot be said here; for the king's bench cannot take judicial notice of the record of the common pleas, unless it come before them by course of law; and therefore the action for the false return should have been brought in the king's bench, where the false return is if the party designed to have a peremptory mandamus. *L. Raym. 125.*

M. 7 G. 3. K. and the justices of Derbyshire. On shewing cause against a mandamus, to register a certain tenement, which was certified to the sessions, as a place set apart for the meeting of protestant dissenters; it was urged, that the parties certifying have not shewn, under what denomination of protestant dissenters they fall; so as to intitle themselves to the indulgence shewn by the act; which only meant to give ease to tender consciences, when professing such principles, as neither endanger the civil government, nor undermine the fundamental doctrines of the christian religion. These people may be Arians, or Socinians, or suppose them only Methodists [which was indeed the fact], as these do not dissent from the church of England, but only pretend to observe her doctrine or discipline with greater purity than their neighbours, it may be a question how far they are the objects of the toleration act, and privileged to meet in conventicles. It was further objected, that the persons certifying do not appear to have complied with the terms of the act, by taking the oaths and making the declaration.—But the court was of opinion, that, in registering and recording a certificate, the justices were merely ministerial: and that, after a meeting-house has been duly registred, still, if the persons resorting to it do not bring themselves within the act, such registering will not protect them from the penalties of the law. And the rule for a mandamus was made absolute. *Black. Rep. 606.*

By the 10 *An. c. 7.* 19 *G. 2. c. 38.* and 21 *G. 2. c. 34.* for regulating episcopal meeting houses in *Scotland*; no letters of orders of any pastor or minister of any episcopal meeting or congregation in *Scotland*, shall be deemed sufficient, but such as have been given by some bishop of the church of *England* or *Ireland*; and such pastor, as often as he shall officiate in any such episcopal meeting house or congregation, shall at some time during the divine service pray for the king by name, and for the royal family, in the same form of words as they shall be directed by lawful authority to be prayed for, in the prayers for the royal family, contained in the liturgy of the church of *England*.

FINALLY: By way of illustration of the general spirit of the toleration laws, it may be proper to subjoin some account of the much agitated question, concerning the fining of dissenters for not serving corporation offices. By the aforesaid statute of the 13 *C. 2. st. 2. c. 1.* *no person shall be appointed to the office of mayor, alderman, recorder, bailiff, town clerk, common council man, or other office of magistracy or place of trust, concerning the government of any corporation, that shall not have, within a year next before, taken the sacrament according to the rites of the church of England; and in default thereof, every such appointment shall be void.*

Upon which act, in the aforesaid case of *Larwood*, it was said by the court, that ever since the making hereof, when a freeman who was a dissenter was chosen alderman of a corporation, he never insisted upon the act as an excuse, but submitted to a fine. And it was also declared in the same case (which was, whether a dissenter being chosen sheriff of *Norwich*, and not having received the sacrament as the act directs, the election was void, in favour of the elected who declined the office;) that the corporation act never designed to exempt dissenters from bearing offices in the government, but to establish a succession of persons who were well affected to it; for otherwise it would be an encouragement to some men to persist in their non-conformity, on purpose to avoid offices of burden and charge, instead of bringing them to conform, which was chiefly intended by that statute. And therefore they declared, that he must submit to a fine, as others had done. But because one of the judges (and, as was said at the bar, the lord keeper also) was of a contrary opinion, namely, that the defendant was sufficiently punished by the corporation act, in being disabled to hold any office or employment of profit, and

and now to punish him by an information would be a double punishment for one offence, which the law will not allow; therefore there being a *capias* against the defendant *pro fine*, and he now appearing in court, he was fined five marks and no more. *Gibf.* 506. *4 Mod.* 269.

But four years before, *M. 2 W.* this was adjudged as a good plea, in the case of *Guilford Town* against *Clarke*, viz. that he being a dissenter, and unqualified by this act, the election was void; and that the by-law for forfeiting 20l upon refusal after election did not take place, because the person being absolutely incapacitated by the statute, there was really no election; and so he could not refuse after election. *Gibf.* 506. *2 Venr.* 247.

T. 16 G. 2. K. and Græfvenor. He was one of the dissenters who was chosen sheriff of London and Middlesex, and refused to take upon him the office; for which an information was moved for against him, as it is an office in which the publick are interested, and therefore not to be compensated by a pecuniary satisfaction to the city. But upon shewing cause, the court discharged the rule; it appearing that there were acts of common council that had provided penalties upon refusers, which is the proper remedy; especially where it is doubtful whether the refusal is a crime or not, which hath never yet been settled. In this case the facts are agreed, and the only doubt is in point of law, and therefore more proper for a civil suit: and so was the opinion of the court, in the case of *Shackleton* of York in lord Hardwick's time. However, they declared, that if after the point was determined against the dissenters, others should refuse; it might be a foundation to move for an information. *Str.* 1193.

Lastly, in the case of *Allen Evans*, esquire, and the chamberlain of London, July 5th, 1762, this matter came thoroughly to be considered. In the year 1748, the corporation of London made a by-law, imposing a fine of 600l upon every person, who being elected should refuse to serve the office of sheriff. (Which fines they appropriated to defray the expence of building the mansion-house.) An action was brought in the sheriff's court, upon this by-law, for the penalty of 600l, against the defendant *Allen Evans*, for refusing to serve the said office. The defendant pleaded this statute, that no person shall be chosen into such office who shall not, within one year next before, have taken the sacrament according to the rites of the church of England; and in default thereof, every such choice is declared to be void. The defendant further pleads the statute

tute of 1 *W. c.* 18. for exempting protestant dissenters from penalties contained in former acts. Then the plea avers, that the sheriffs of London are officers who before the 13 *C.* 2. were persons bearing such office; that the defendant was and still is a protestant dissenter from the church of England, a person of a scrupulous conscience in the exercise of religion, and during all that time has and still does frequent the congregation of religious worship amongst protestant dissenters. The defendant then states, that he took the oaths, and subscribed the declaration, according to the act of toleration, in the year 1751, at the sessions held for the county of Middlesex; and that his taking the oaths was duly registred in the court of sessions: that he had not within one year before the supposed election taken the sacrament of the Lord's supper according to the rites of the church of England, nor has he at any time since done it, nor can he in conscience take the same, nor was he bound to take the same since May 1751: that of these premises the lord mayor, aldermen, and citizens had notice; and that by reason thereof, and of the act of parliament made for governing corporations, the mayor, aldermen, and citizens assembled in July 1745, and the livery were prohibited from electing, and had no power to elect him sheriff: that he was disabled from, and incapable of being elected; and that the supposed election of him was void.—To this plea, the plaintiff replied, that by the statute of the 5 *G. c.* 6. *f.* 3. it is enacted, that no person chosen into such office shall be removed or otherwise prosecuted, for omission of taking the sacrament, nor shall any incapacity or disability be incurred by reason of the same (unless he be removed, or prosecution commenced within six months).——To this replication the defendant demurred; and the plaintiff joined in demurrer. And judgment was given for the plaintiff, in the sheriff's court.

The defendant sued a writ of error, before the mayor and sheriffs in the court of the Hustings: and the judgment was there affirmed.

A writ of error of this judgment given in the Hustings was brought before the commissioners of St. Martin's le Grand. The judges named in the commission were the chief baron Parker, Foster, Bathurst, and Wilmot. The plaintiff in the original action pleaded, *In nullo est erratum*. The cause was argued three several times by the most eminent counsel in the profession. The counsel for the defendant objected to the declaration, because the plaintiff had not stated therein, that the city of London had any right

right either by charter or prescription to elect the defendant sheriff: and the by-law being made to regulate this franchise, it ought to appear on the face of the declaration, that they are intitled to the franchise; which can only be by charter or prescription. But the judges, being unanimous in their opinion upon the real merits of this cause, declined giving any opinion upon this point, though they all seemed to think there was great weight in it.

Mr. justice Foster delivered his opinion to the following effect:—I shall found my opinion upon the toleration and corporation acts. I shall consider the corporation act, in the light of a prohibition to the electors. It was considered in that light in the case of the mayor of *Guilford* and *Clarke*. Notwithstanding there were in that case exceptions to the declaration which were said to be fatal, yet it appears by the report, that the court delivered their opinion in this manner,—That the matter pleaded by the defendant was a good bar; that to make a default in the defendant, there must have been an election antecedent; and the election of such a one as the defendant is, is absolutely prohibited by the statute: then I add, that since the corporation act is prohibitory to the electors, now they have wilfully after notice chosen the defendant, they have contravened that whole prohibition, and acted contrary to it; and I am of opinion, that the election is a mere nullity.—The preamble to acts of parliament is the great window by which light is let in upon the sense of them. If you consider the preamble to the corporation act, it will appear beyond a doubt, that the intention of the legislature in passing the corporation act was to exclude protestant dissenters of all denominations from corporation offices. The preamble to the act, after making short mention of the late troubles, says, “To the end that the successions
“in such corporations may be most probably perpetuated
“in the hands of persons well affected to his majesty and
“the established government, it being too well known,
“that notwithstanding all his majesty’s endeavours, and
“indulgence in pardoning what is past, nevertheless many
“evil spirits are still working; for prevention of the
“like mischief for the time to come, and for preservation
“of the public peace both in church and state, be it enacted”——and so on. These were the motives upon which the legislature proceeded in making this act. The means they made use of to effect these ends were two: One regards the persons who were at that time in corporation offices; the other, those who should come into such offices

of trust for the future. The act, in order to accomplish the great ends for which it was made, is very particular : “ No person shall for ever hereafter be placed or chosen in “ or to any the offices or places aforesaid, who shall not “ have within one year next before such election taken the “ sacrament of the Lord’s supper according to the rites of “ the church of England :” and then it goes on, and says, that “ every person so placed or chosen shall take the “ oaths and subscribe the declaration at the same time the “ oath of office is administered ; and in default thereof, “ every such election is declared to be void.” This clause, as I take it, consists of two branches, complete, distinct, and independent in their own nature. The first regards persons who have a right, and have power in possession ; the second regards those who should be candidates, and be elected hereafter. The first is in my opinion prohibitory upon the electors. It lays restraint upon them in the exercise of their power of electing. It confines them to persons who conform to what is prescribed in the act. The words, as I read them, are that no person not previously qualified shall be for ever hereafter elected. What is that but saying, that no person having power to elect, shall elect any person not previously qualified as the act directs. I cannot make out any difference between the two terms, that the election shall be void, and that they shall not elect such persons.—The second branch of this clause, regards only the condition of the candidate. It goes upon a supposition, that a candidate may be eligible, and actually elected into the office ; and, upon that supposition, it requires a form to be gone thro’ by him, and in default thereof his election is declared to be void. I do not found my opinion upon this branch of the statute, but upon the other, which (I take it) prohibits the election of a person not previously qualified.—As to the words in the second branch “ that in default thereof the election shall be void,” I think that according to true grammar and the strict meaning of the words, it means plainly this ; in default of those things being done, that are required to be done by a candidate after his election, and not in default of that which this act no way requires. The corporation act does not require from any person who is a candidate for a corporation office, that he shall take the sacrament : he is under another obligation to conform to the established church. And tho’ I admit that the rubrick did formerly enjoin conformity to the established church, yet in the construction of these words, “ in default thereof the election to be void,”

we must confine ourselves to those duties which this act alone requires. We must do so in common grammar and construction. There is no running into the other branch of the clause in order to construe this. If then the act is prohibitory upon the electors, the consequence will be, that if they having due notice of the incapacity of the candidate, proceed notwithstanding to the election of a person declared by the statute to be not eligible; the whole proceeding will be a mere nullity, in contravention of the prohibition to the electors, wilful, open, and undisguised.—A right of action cannot accrue to the corporation from such an improper proceeding, contrary to the statute, prohibited by the statute, and consequently null and void from the beginning. Thus it stands with regard to the corporation.—As to the defendant: He is now called upon under a penalty, to usurp an office upon the crown; which usurpation will subject him to a criminal prosecution and all its consequences. A strange dilemma this: To be obliged to usurp upon the crown, or forfeit the penalty of the by-law. Can the by-law purge the usurpation? A by-law cannot purge or excuse an usurpation. It would be absurd then to say, it can oblige a man to usurp:—It hath been said, that all corporations have a right to the service of their members. All corporations, under proper limitations, certainly have this right. But still it is a right subject to the controul of the legislature. And in matters of election, they must submit to such regulations as the state shall think fit to make.—It is asked, Shall persons who live in open contempt of all government in a state, shelter themselves under this act? That was said in *Larwood's* case; and it has been thrown out in this case, not very decently. It is sufficient at this time to say, that the case of debauchees and infidels was not in the contemplation of the legislature at the time this act was made. Consequently, this act cannot extend to them. The act was plainly levelled at persons of quite a different character. It was not levelled at atheists or infidels, but protestant dissenters. Besides the defendant does not endeavour to shelter himself under the idle excuse which the objection puts him to, of being an atheist, debauchee, or an infidel: but the defendant, as he pleads the toleration act, avers that he does not live in open disobedience to the ordinances of the church, altho' he has taken some scruples in regard to the mode of administration in the established church: he is real and sincere in his scruples, and lives in obedience to the ordinances of the church.

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—A distinction has been made in the argument, between the acts and proceedings being void of themselves, and only voidable. The answer I give to that is, that the point now in question will not turn, nor do I put it upon that branch of the clause which declares the election void, but upon that which absolutely prohibits the election, and consequently renders it a mere nullity.—It has been said, that the construction now contended for is partial to dissenters, in excusing them from offices of burden. I say, yes, it is; and it therefore excludes them from all corporation offices which are attended with profit and honour. It would be absurd to say, that the same law that exempts them from the one, as persons unworthy of a publick trust, has still left them liable to the other offices, be the trust that attends the office what it may. The trust attending the office of sheriff of the city of London is a high trust. Therefore if protestant dissenters are excluded from offices attended with profit, merely as persons not worthy of a publick trust; it would be odd to say, that they shall be obliged to serve the office of sheriff, which is not only an office of honour, but likewise an office of very high trust.—It was said in *Larwood's case*, and I believe it had weight, that no man can by his own plea disable himself, nor excuse one default by another. It is sufficient now to say, that *Larwood's case* was totally and substantially different from the present. He had not properly pleaded to the toleration act, and therefore could take no advantage of it. The present defendant has pleaded it properly, and shewn himself not eligible. The defendant does not plead the toleration act and disability, to excuse one offence by another; but to shew, that altho' the rubrick did require a conformity in all things, as to receive the sacrament in the church three times a year, and the like, yet now his not complying with the rubrick is not to be imputed to him as a crime; that the same act which hath taken away the offence, hath taken away the guilt; and that he is guilty of no offence, in not complying with that which does not bind him; that by the toleration act the rubrick is taken out of the defendant's way, and doth not extend to his case. There are particular branches of the act, from which this intent may be collected; but I am clearly of this opinion, from the whole spirit and frame of it, The act of toleration is not to be considered merely as an act of connivance and exemption from former laws. It was made, that the publick worship of the dissenters might be legal, and that they might

might be intitled to the publick protection. Upon different occasions in the act, the religious worship of the dissenters is spoken of, as a mode of worship tolerated by the act. This clearly shews, that the mode of worship among the dissenters is legal, and authorized by law. There were former laws obliging persons to resort to different churches, to be attendant on divine service; and dissenters are now obliged to the same in their way of worship. Persons contemptuously disturbing the publick worship of protestant dissenters, are liable to the same penalties with those who disturb the worship in parish churches or chapels. As to persons acting as preachers in dissenting congregations; they are exempted from serving upon juries, and from publick offices, as fully as those of the established church are by the common law. —Upon the whole: The corporation act being prohibitory upon the electors, every election contrary to it is a mere nullity; and the toleration act having dispensed with the conformity of the defendant in this particular; the judgment ought to be reversed.

By Mr. Justice Wilmot: The great question in this cause is, Whether the plaintiff in the original action, under all the circumstances disclosed by the pleadings, is intitled to recover this sum of 600l, imposed upon the defendant, for refusing to comply with that part of the by-law stated in the declaration, which directs that “every person elected into the office of sheriff shall appear before the lord mayor and aldermen, and become bound in a bond for taking the oath of office on the vigil of St. Michael.”—I am of opinion, the plaintiff is not intitled to recover in this action; and that the judgments which have been given in this cause ought to be reversed.—Several positions have been laid down, by the counsel who argued in this case, that are clear and indisputable: First, It is clear, that of common right a power is inherent in every corporation, to call upon their members for the performance of all corporate duties. Secondly, That the execution of corporation offices is one of the duties. Thirdly, That a power of making by-laws is incident to every corporation. Fourthly, That a by-law imposing a fine for the refusal of a corporation office is good. It is equally clear, that the right which every corporation has of calling upon their members to execute corporation offices may be abridged by themselves, or by the general laws of the land. The true question is, whether this right has not been abridged in the present

case, and what will be the legal consequences of such abridgment.—The unhappy situation the royal family and the nation had been in before the restoration, made the legislature willing to guard against a relapse; and therefore they thought it necessary to regulate the corporations in an arbitrary way, by removing some officers, and placing others in their room who were better affected, and also by providing officers for the future. The method they took was, by vesting a power in commissioners (as we find in the former part of the act), to turn out whom they pleased, and place others in their offices. Of these they did not require any sacramental qualification; because while the extraordinary power subsisted, there was another check or controul. But when that commission expired, they did not then chuse to rest upon oaths and declarations; but measured the fitness of men by their antecedent religious habit; and made the having received the sacrament, according to the rites of the church of England, the criterion by which that fitness was to be determined. They did not propose it as a test, to be given at, or after his election; because they thought that the charms of power in possession, might make sudden conversions, which might not always be sincere.—The intent of the legislature is expressed in the strongest terms, to effectuate such an intention. “Provided, that (after the expiration of the commissions) no person shall for ever hereafter be placed, elected, or chosen in or to any of the offices or places aforesaid, that shall not have, within one year next before, taken the sacrament,” and so on: “And in default hereof, every such election is hereby declared to be void.” Now this clause is not addressed to the party elected, but to the electors. The prohibition is laid most clearly upon the persons who had a right to elect. It is the voice of the legislature, commanding them not to elect such persons. An election contrary to that prohibition, is a transgression; and in this case it was a wilful transgression, because they had notice that Evans was one of those persons; if wilful, then a moral wrong, which can never lay a foundation for an action in a court of justice. Courts of justice are to enforce the will of the society. Laws manifest that will. And it is the duty of courts of justice to carry these laws into execution; but they are not to sustain actions, for doing what the society has forbid.—The injunction not to elect, extinguishes the right to elect. The act does not make the office, but the election void.

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The election in the present case is an infraction of the law : and right cannot spring out of wrong.——If an act of parliament was to be made, with a clause that all unmarried men should be incapable of being elected ; this would work a release of the original contract, as to such persons. A valid election is a condition, precedent to the right which the corporation has to command, and to the obligation on the members to obey.—It has been said, that this act was not made to ease dissenters, but to punish them ; and that an exemption from burdensome offices will be an ease ; that the office of sheriff being one of those, it will be giving the act an effect which the legislature did not intend ; that it is more agreeable to the intention of the legislature, to construe the office void as to the person elected, and good as to the corporation, who are punishing as for a contumacy. This is the substantial part of the argument. Many cases have been cited, where acts have been deemed good to a certain degree, and void as to all others. But there never was, and it is impossible there ever should be, a case, where the word *void* was construed in such a manner, as to make the act void as to a person who broke the law, and good as to the persons who have concurred in breaking it. The only point the legislature had in view was, to secure the power to persons who outwardly professed the religion of the state. The punishment of non-conformists, by excluding them from power, was the consequence, not the end, of the law. We, as judges, ought to expound the law with the same spirit it was made ; and therefore ought not to construe it as a vindictive law, for any purpose but its own end. Whether this case occurred to the legislature, or how they thought it should be determined, does not appear. Different men may make different conjectures. But arbitrary conjectures never ought to be the basis of judicial determinations. If it had occurred, and they had intended to have made any difference between burdensome and lucrative offices, they would have taken notice of it. The construction now must be the same. Suppose it had been the office of chamberlain, and the question put to the legislature ; the answer must have been, We intend to keep non-conformists out of power, and therefore we command corporations not to elect them. They cannot be exposed to a penalty for not executing an office to which they cannot be elected : the exemption from both, makes it equal.——As to what is said, that persons may be qualified for a lucrative, and not for a burdensome

office; I do not see how such a case can exist. For if they are qualified to accept a lucrative office, they are qualified to bear a burdensome one. It shews that it was only a mockery in them; but it does not prove, that the scruples of other dissenters are imaginary. It would be as unjust to judge of the scruples of all the dissenters, by the conduct of some; as to judge of the doctrines of the established church, by the lives of some of those who profess it.——It has been urged, that a man shall not be permitted to excuse himself, on account of a disability occasioned by his own default; that it is an aggravation of his offence, to excuse one crime by another; and that the toleration act did not mean to exempt dissenters from relative duties. Instances have been mentioned of persons out of their senses, who are not allowed to disable themselves; if so, when the incapacity arises from a natural disability, *a fortiori* in the case of a disability arising from neglect. First, I deny the rule. In *Skin.* 576. Fitzherbert was of a different opinion. It may seem hard, that a man shall avoid his own acts for dures of man, and not for a visitation from heaven. But the reason is, that the law has directed a mode of inquiry, and the king is to take madmen under his immediate protection, and after office found to avoid such acts as he thinks proper. 5 *Mod.* 421. Madmen cannot be chosen into corporation offices. In *Eq. Caf. Abr.* 279. Lord King has drawn a rational line, between the acts done by an insane person to the prejudice of others, and the acts done by him to the prejudice of himself. *King and Larwood* is no authority in the present case; because it is clear, that the toleration act was not pleaded, and it was only the opinion of two judges against Sir Samuel Eyre. In 4 *Mod.* 274. Lord Somers is said to have been of the same opinion as Sir Samuel Eyre. The fine was only five marks; which shews the judges thought it a tender case. I observe, it was admitted in that case, that if a man be disabled by judgment to bear an office, there he is excused, because *judicium redditur in invitum*. Why then shall not an act of parliament excuse, which is the judgment of the whole legislature.——As to Sir John Read's case, which was mentioned, it was an information in the exchequer 28 Nov. 26 C. 2. He was appointed sheriff of Hertfordshire, was sworn, and took upon himself the execution of the office. A case very different from this; for he was capable of the office at the time he was appointed, and had been in possession. In the present case, the

the defendant was not eligible. Sir John Read had alleged a disability which it was in his power to remove, and which it was his duty to remove. But here the defendant's receiving the sacrament must be precedent; and since the toleration act, it is not his duty to receive it.—*Box and Woolaston*, another case cited, turned upon the informality in the plaintiff's replication. Had it been determined on the point it is now produced to prove, it would certainly have been mentioned by chief justice Holt and Eyre, as a case in favour of their opinions.—The case in 3 *Lev.* 116. differs as much from the present case, as between legally and illegally elected.—I am therefore clearly of opinion, that the judgment ought to be reversed.

The other two judges delivered their opinions to the like effect: and the judgment was reversed.

Upon this, the corporation by writ of error brought the cause before the house of lords, when all the judges, who had not sat as delegates (except Mr. justice Yates who was ill) gave their opinions seriatim; and all, except Mr. baron Perrot who was of opinion to reverse the judgment, delivered their opinion for confirming it (g). Upon which occasion lord Mansfield said; In every view in which I have been able to consider this matter, I think this action cannot be supported. If they rely on the corporation act; by the literal and express provision of that act, no person can be elected, who hath not within a year taken the sacrament in the church of England: the defendant hath not taken the sacrament within a year; he is therefore not

(g) The proceedings in this writ of error are reported in 6 *Bro. P. C.* 181. The question put to the judges was, "Whether, upon the facts admitted by the pleadings in this cause, the defendant is at liberty, or should be allowed, to object to the validity of his election, on account of not having taken the sacrament, according to the rites of the church of England, within a year before, in bar of this action?" And the judges, having taken a week's time to consider, and differing in their opinions, delivered them seriatim with their reasons; Mr. Justice Hewit, Mr. Justice Aston, Mr. Justice Gould, Mr. Baron Adams, Mr. Baron Smythe, and Mr. Justice Clive, were of opinion in the affirmative; and Mr. Baron Perrot in the negative. Whereupon it was ordered and adjudged, that the judgment given by the commissioners delegates should be affirmed, and the record remitted.

elected.

elected. Here they fail.——If they ground it on the general design of the legislature in passing the corporation act; the design was, to exclude dissenters from office, and disable them from serving. For in those times, when a spirit of intolerance prevailed, and severe measures were pursued, the dissenters were reputed and treated as persons ill-affected and dangerous to the government: the defendant therefore, a dissenter, and in the eye of this law a person dangerous and ill-affected, is excluded from office, and disabled from serving. Here they fail.——If they ground the action on their own by-law; since that by-law was professedly made to procure fit and able persons to serve the office, and the defendant is not fit and able, being expressly disabled by statute law, here too they fail.——If they ground it on his disability, being owing to a neglect of taking the sacrament at church, when he ought to have done it; the toleration act having freed the dissenters from all obligation to take the sacrament at church, the defendant is guilty of no neglect, no criminal neglect: here therefore also they fail.——And after having expatiated on each of these several heads, he adds: The defendant in the present cause pleads that he is a dissenter within the description of the toleration act; that he hath not taken the sacrament in the church of England within one year preceding the time of his supposed election, nor ever in his whole life; and that he cannot in conscience do it. Conscience is not controulable by human laws, nor amenable to human tribunals. Persecution, or attempts to force conscience, will never produce conviction; and are only calculated to make hypocrites, or martyrs. My lords, there never was a single instance, from the Saxon times down to our own, in which a man was ever punished for erroneous opinions concerning rites or modes of worship, but upon some positive law. The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions. For atheism, blasphemy, and reviling the christian religion, there have been instances of persons prosecuted and punished upon the common law; but bare nonconformity is no sin by the common law: and all positive laws, inflicting any pains or penalties for nonconformity to the established rites and modes, are repealed by the act of toleration; and dissenters are thereby exempted from all ecclesiastical censures. What bloodshed and confusion have been occasioned from the reign of Hen. 4. when the first penal statutes were enacted, down to the revolution

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in this kingdom, by laws made to force conscience? There is nothing certainly more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the christian religion, more iniquitous and unjust, more impolitic, than persecution. It is against natural religion, revealed religion, and sound policy. Sad experience, and a large mind, taught that great man, the president De Thou, this doctrine; let any man read the many admirable things which, tho' a papist, he hath dared to advance upon the subject, in the dedication of his history to Henry the fourth of France (which I never read without rapture); and he will be fully convinced, not only how cruel, but how impolitic, it is to persecute for religious opinions. As a subject of Great Britain, I should not have been sorry, if France had continued to cherish the Jesuits, and to persecute the Huguenots. There was no occasion to revoke the edict of Nantz; the Jesuits needed only to have advised a plan, similar to what is contended for in the present case: make a law to render them incapable of office; make another, to punish them for not serving. If they accept, punish them; if they refuse, punish them: if they say yes, punish them; if they say no, punish them. My lords, this is a most exquisite dilemma, from which there is no escaping; it is a trap a man cannot get out of; it is as bad persecution as that of Procrustes: if they are too short, stretch them; if they are too long, lop them. Small would have been their consolation to have been gravely told, The edict of Nantz is kept inviolable; you have the full benefit of that act of toleration; you may take the sacrament in your own way with impunity; you are not compelled to go to mass. Were this case but told in the city of London, as of a proceeding in France; how would they exclaim against the Jesuitical distinction? and yet in truth it comes from themselves: the Jesuits never thought of it: when they meant to prosecute, their act of toleration, the edict of Nantz, was repealed. This by-law, by which the dissenters are to be reduced to this wretched dilemma, is a by-law of the city, a local corporation, contrary to an act of parliament which is the law of the land: a modern by-law, of very modern date, made long since the corporation act, long since the toleration act, in the face of them; for they knew these laws were in being. It was made in some year of the reign of the late king;

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Dissenters.

I forget which: but it was made about the time of building the mansion-house. Now if it could be supposed, that the city have a power of making such a by-law; it would intirely subvert the toleration act, the design of which was to exempt the dissenters from all penalties: for by such a by-law they have it in their power to make every dissenter pay a fine of 600l, or any sum they please; for it amounts to that. The professed design of making this by-law, was to get fit and able persons to serve the office: and the plaintiff sets forth in his declaration, that if the dissenters are excluded, they shall want fit and able persons to serve the office. But were I to deliver my own suspicion, it would be that they did not so much wish for their services, as for their fines. Dissenters have been appointed to this office, one who was blind, another who was bedridden: not, I suppose, on account of their being fit and able to serve the office. No; they were disabled both by nature and by law. We had a case lately in the courts below, of a man chosen mayor of a corporation, while he was beyond the seas, with his majesty's troops in America; and they knew him to be so. Did they want him to serve the office? No; it was impossible. But they had a mind to continue the former mayor a year longer, and to have a pretence of setting aside him who was now chosen, on all future occasions, as having been elected before. In the present case, the defendant was by law incapable at the time of his pretended election: and it is my firm persuasion, that he was chosen because he was incapable. If he had been capable, he had not been chosen; for they did not want him to serve the office. They chose him, because without a breach of the law, and an usurpation upon the crown, he could not serve the office. They chose him, that he might fall under the penalty of their by-law made to serve a particular purpose; in opposition to which, he hath pleaded a legal disability grounded on two acts of parliament: as I am of opinion that this plea is good, I conclude with moving your lordships that the judgment be affirmed.—And the judgment was immediately affirmed, nemine contradicente. *Appendix to Furneaux's letters to Mr. Justice Blackstone, 2d Edit.*

Distribution.

Distribution.

THE distribution of intestates effects, is treated of under the title *Wills*.

Divine Service. See *Publick Worship*.

Divorce. See *Marriage*.

Doctors Commons.

DOCTORS commons is the college of civilians in London, which was purchased by Dr. Harvey, dean of the arches, for the professors of the civil law. Here commonly reside the judge of the arches court of Canterbury, the judge of the admiralty, and the judge of the prerogative court of Canterbury, with divers other eminent civilians; who there living (for diet and lodging) in a collegiate manner, and commoning together, it is known by the name of Doctors commons. It was burned down in the fire of London, and rebuilt at the charge of the profession. *Chamberl. Pr. State*.

Donatio causa mortis.

DOnatio causa mortis, is a gift in prospect of death; where a person moved with the consideration of his mortality, doth give and deliver something to another, to be his in case the giver die, but if he lives he is to have it again. *Law of Test. 179.*

Which is treated of more at large under the title *Wills*.

Donative.

Donative.

Donative, what. 1. **A** Donative is a spiritual preferment, be it church, chapel, or vicarage, which is in the free gift or collation of the patron, without making any presentation to the bishop; and without admission, institution, or induction by any mandate from the bishop or other; but the donee may by the patron, or by any other authorized by the patron, be put into possession. *Dig.* p. 1. c. 13. (b)

Original of donatives.

2. And this right in the donor (together with the exemption of the church from ecclesiastical jurisdiction) seemeth to have come from the consent of the bishop in some particular cases: as when the lord of a manor in a great parish, having his tenants about him at a remote distance from the parish church, did offer to build and endow a church there, provided that it should belong intirely to him and his family, to put in such persons as they should think fit, if they were in holy orders. It is very possible, that the bishops at that time, to encourage such a work, might permit them to enjoy this liberty; which being continued time out of mind, is turned into a prescription. And they are to be distinguished from those called sine-cures, and exempt jurisdictions; for sine-cures in truth are benefices presentable; but by means of vicarages endowed in the same places, the persons who enjoy them have by long custom been excused from residence: and exempt jurisdictions are not so-called, because they are under no ordinary; but because they are not under the ordinary of the diocese, but have one of their own; and are therefore called peculiars. 1 *Still.* 335.

Of what kind of benefices or dignities.

3. There is not any one particular sort of ecclesiastical preferments, that are peculiarly said to be donatives; for some of all sorts may be donative, as well as presentative, or elective. For bishopricks were donative in England, after the conquest, until the time of king John. So a prebend may be donative, as at Windsor and Westminster, in the chapels of the king, where the prebend being void, it is said that the king shall make collation of his clerk by patent, and by force thereof he shall take possession without any institution or induction. Also a benefice with

(b) *Mor.* 765, *Cro. Jac.* 63. *Yelv.* 60.

cure of souls may be a donative; as the rectory of Briery or Burien in Cornwall: and so the church of the tower of London is a cure of souls, and the king's donative. *Watf. c. 15. (i)*

Yet some of these instances, and other such like, may be said to resemble donations, rather than to be donations, properly so called; such as the grant of the king to prebends without institution; as also, the collation of a bishop without presentation: and the nomination to perpetual curacies, which is without either presentation, institution, or induction. For these differ from donatives properly so called, which are given and fully possessed by the sole donation of the patron in writing; inasmuch as collations and royal grants are to be followed by induction and installment; and persons nominated to curacies are to be authorized by a licence from the bishop, before they can legally officiate. Whereas possession by donation is not subject to any of these consequents, but receives its full essence and effect from the single act and sole authority of the donor as aforesaid. *Watf. c. 15.*

4. By the several stamp acts; for every sheet or piece Stamp of vellum or parchment, or sheet of paper, upon which any donation which shall pass the great seal of England, or upon which any donation to be made by any patron whatsoever, of or to any benefice, dignity, or ecclesiastical promotion, shall be engrossed or written, shall be paid a treble forty shilling stamp duty. Provided, that such benefice, dignity, or promotion, be of the yearly value of 10 l or above in the king's books.

If under that, it seemeth that the same shall be upon a treble 5s stamp.

5. The form of a donation may be thus: "To all to whom these presents shall come. Know ye, that I
" A. B. of _____ in the county of _____ esquire,
" have given and granted, and by these presents do give
" and grant, to my beloved in Christ C. D. clerk, the
" office or place of curate" [or as the case shall be] "of the
" chapel of _____ in the county of _____ now lawfully
" vacant, and to my donation and free disposition in full
" right belonging, and by these presents do make, constitute;
" and appoint him the said C. D. curate of the said cha-
" pel; to have, hold, and enjoy the said office or place of

(i) 2 *Rel. Ab.* 341. 356. 11 *H.* 4. 9. *Co. Lit.* 344.
Cro. Ja. 63. *Cro. Eliz.* 653.

" curate

“ curate in the chapel aforesaid to him the said C. D. during his natural life, with all and every the salaries, stipends, rights, and appurtenances, to the same office or place of curate aforesaid, in any wise belonging or appertaining, as fully, freely, and perfectly, and in as ample manner and form, as any other hath or ought to have held and enjoyed the same. In witness whereof I have hereunto set my hand and seal, the ——— day of ——— in the year of our Lord ———” *Edon*, 459.

Or thus: “ To all to whom these presents shall come, A. B. of ——— in the county of ——— esquire, lord of the manor of ——— in the county of ——— sendeth greeting. Whereas the chapel of ——— in the county aforesaid is now vacant, and to my donation in full right belongeth; know ye, that I the aforesaid A. B. have given and granted to my beloved in Christ C. D. clerk, the aforesaid chapel of ——— with all its rights and appurtenances, and by the tenor of these presents do induc him the said C. D. into corporal possession of the said chapel, with all its appurtenances. In witness whereof, &c.” *Edon*, 461.

Effect of a donation.

6. The grant of a donative being once made, creates a right as full and lasting as institution and induction: that is, a right not to be taken away, but by the resignation or deprivation of the donee; the resignation to be made to the donor, and the deprivation to be made by the donor likewise; both the church and the clerk being exempt from ordinary jurisdiction. To this purpose it is, what we find in the reports of Sir John Davis, that a donative cannot be granted for years or at will only, because this great inconvenience would follow, that the freehold might be in perpetual abeyance; which is an inconvenience that the law will not suffer. *Gibf.* 819. (k)

How far the donee must qualify, as other clerks promoted.

7. Altho' a clerk upon whom a donative is bestowed, doth not gain possession by presentation, institution, and induction; yet he is obliged, in order to preserve and maintain his possession, to be qualified and to qualify himself in many things, as others do who are presented, instituted, and induced: as,

(1) He must be a priest; without which, by the 13 & 14 C. 2. c. 4. f. 14. no person shall be admitted to any ecclesiastical promotion.

(k) *Dav.* 46.

(2) He

(2) He must take the oaths of allegiance and supremacy, before he takes the donation; and this he must do before such person who hath authority to admit him thereunto, that is, his patron; by the 1 *El. c. 1.* and 1 *W. c. 8. f. 5.*

(3) And if the donative be a benefice with cure, he that takes it ought first to subscribe the thirty-nine articles in the presence of the *ordinary* (by the 13 *El. c. 12.*) which Dr. Watson supposeth must be understood of the ordinary of the diocese, and not of his patron; altho' the patron hath the power of visiting and correcting him, and not the ordinary of the diocese. *Watf. c. 15.*

(4) He must also, before his admission to be incumbent or have possession of his donative, subscribe before the archbishop, bishop, or ordinary of the diocese, (or their vicar general, chancellor, or commissary respectively,) the declaration of conformity to the liturgy of the church of England as by law established. And if the donative hath a parish church belonging to it; he must have a certificate under the hand and seal of the person before whom he subscribed, to be read by him in such church afterwards. 13 & 14 *C. 2. c. 4.* 15 *C. 2. c. 6. f. 5.*

(5) And he ought to read the morning and evening prayers in his church or chapel, within two months after he shall be in the actual possession of his donative, or in case of impediment (to be allowed of by the ordinary) then within one month after such impediment removed; together with the form of giving assent and consent thereunto: by the 13 & 14 *C. 2. c. 4.*

(6) He must also within two months (or at the time when he reads the morning and evening prayers as aforesaid) read and assent to the thirty-nine articles, if it be a place with cure: for although it is said in the statute of the 13 *Eliz. c. 12. f. 2.* that this is to be done in two months after *induction*; yet when the having cure of souls is the foundation of reading and assenting, wherever there is cure of souls, the *induction* may be well interpreted of any actual possession whatsoever. 13 *El. c. 12.* 23 *G. 2. c. 28.* *Watf. c. 15.*

(7) He must within three months after subscription of the declaration aforesaid, within his parish church as aforesaid, read the ordinary's certificate of his subscription, and again make the same declaration; by the 13 & 14 *C. 2. c. 4.*

(8) And finally, within six months he must take the oaths of allegiance, supremacy, and abjuration; in one of
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the courts at Westminster, or at the general or quarter sessions. 1 G. 2. c. 13. 9 G. 2. c. 26.

In the case of *Powel and Milbank*, M. 13 G. 3. C. P. On an action for money had and received to the plaintiff's use the defendant pleaded the general issue, and a verdict was given for the plaintiff, on the following state of the case. *William Jolyffe* and *Eleanor* his wife, in right of the said *Eleanor*, nominated and appointed the plaintiff, on the 17th of June 1770, to the donative of *Chester le Street*, in the county and diocese of Durham, with cure of souls. The plaintiff was then in priest's orders, and had subscribed the 39 articles, and the three articles in the 36th canon, at the time of his ordination: but did not prove, at the trial of the cause, tho' required so to do, that he subscribed the articles before the bishop; nor that he had publicly read the same in the church of *Chester le Street* aforesaid, with declaration of his assent to the same; nor that he had subscribed the declaration in the statute of 13 & 14 C. 2. since his nomination to the donative; nor that he had any licence from the bishop to preach in the said church. In the argument of this cause, two questions were made; First, whether an incumbent of a donative with cure is obliged to conform to the statutes of Elizabeth and Charles the second. And secondly, whether in this action it was necessary for him to give evidence, that he had performed the several requisites contained in these statutes—As the court gave their opinion on the second question, that he was not obliged to give such evidence, unless some proof had been made by the defendant to raise a doubt whether he had subscribed or not, they did not give a judicial determination upon the former point, but strongly inclined, that donatives, with cure of souls, are within all the reasons, religious as well as political, upon which the acts of uniformity are founded, and seemed to think that this had been settled long ago, in the case of *Carver and Pinkney*, M. 13 C. 2. as reported in 3 Lev. 82. *Black. Rep.* 851. (1)

8. Donatives

(1) This case is more fully reported in 3 *Wils.* 355. where the court was unanimously of opinion that the plaintiff having proved that he was in priest's orders, and duly appointed to the donative, the other requisites should be presumed to have been performed, no proof having been offered to the contrary; for which presumption were cited, *Monks v. Butler*, 1 *Rel.*

8. Donatives are within the statute against simony. *Donative within the statutes of simony and plurality.*
Deg. p. 1. c. 13. (m)

And where they have cure of souls, they are likewise within the statute against pluralities. *Deg. p. 1. c. 13.*

9. If the patron of a donative do not nominate a clerk, *Lapse.* there can be no lapse thereof, unless it be so specially provided for in the foundation: but the bishop may compel him to do it by spiritual censures. *1 Inst. 344. Gibf. 819. (n)*

But if it is augmented by queen Anne's bounty (as will appear afterwards) it will lapse in like manner as presentative livings.

10. Lord Coke says, if the king doth found a church, *How far exempt from the ordinary's jurisdiction.* hospital, or free chapel donative, he may exempt the same from ordinary jurisdiction, and his chancellor shall visit the same. Yea, if he do found the same, without any special exemption; the ordinary is not, but the king's chancellor to visit it. And as the king may create donatives exempt from the visitation of the ordinary; so he may by his charter license any subject to found such a church or chapel, and to ordain that it shall be donative and not presentative, and to be visited by the founder and not by the ordinary. And thus began donatives in England (he says), whereof common persons were patrons. *1 Inst. 344.*

But the register supposeth a royal foundation, and not a mere royal licence: and that it must be proved to be an-

1 Rel. Rep. 83, and Clayton Pl. of Aff. 48. See Benefice, VII. 2. In this case no objection was made to the trial of the right by the action for money had and received, and the advowson was stated to be donative by the special case, so that the court of common pleas proceeding on the above-mentioned presumption, gave judgment for the plaintiff. But in a former trial between the same parties, *Mitch. 12 G. 3.* in the king's bench, Lord Mansfield was of opinion upon the evidence, that the benefice was not a donative but a perpetual cure, and that the licence of the bishop was necessary to give the plaintiff possession, without which he could not maintain an action for money had and received of the profits of his office. So that judgment was then given for the defendant, who had been licensed by the bishop, and was in possession of the curacy. *1 T. Rep. 399. See also Curates.*

(m) Said to be so resolved in *Carver v. Pinkney, 3 Lev. 82.*

(n) *Telv. 61. Fairchild v. Gayer.*

cient too: and therefore a new licence will not come up to the Register. 1 *Still.* 335.

However it is certain, that the ordinary cannot visit a donative, but the patron must visit the same, by commissioners to be appointed by him. 1 *Inst.* 344.

And by consequence a donative is freed from procurations. *Deg.* p. 1. c. 13. And the incumbent is exempted (*Dr. Gibson* says) from attendance at visitations. *Gibson*, 819.

And it is said, that if the bishop shall take upon him to visit a donative, and deprive the incumbent, he runs himself into the danger of a præmunire. *Deg.* p. 1. c. 13.

And in such case was Barlow, bishop of Bath, in the time of king Edward the sixth; and was forced to get a pardon, for having deprived the dean of Wells, which was a donative by letters patents from the king. 3 *Inst.* 122.

But altho' the ordinary hath not power as to the place, so as to regulate seats in that church, or the like; yet he hath power as to the parson, if he committeth any misdemeanor, to proceed against him by spiritual censures. As in the case of *Colefatt and Newcomb*, *M. 4 An.* A minister of a donative was sued in the ecclesiastical court, for that, when he read prayers, he did not read the whole service, but left out what part of it he thought fit; and for preaching without licence. And it was moved for a prohibition, upon a suggestion that the church was a donative: and argued, that donatives were exempt from the jurisdiction of the ordinary, and that it was a lay thing, and the bishop could not visit it; and that if the incumbent was guilty of heresy, the ordinary could not meddle with him, for the parson was privileged in respect to the place; but the patron might by commission examine the matter, and upon cause deprive him. But Powell justice, in the absence of Holt chief justice, took the difference, where the suit in the ecclesiastical court is in order to deprivation, and where only for reformation of manners: in the former case the court will prohibit, but not in the latter: and therefore if in this case the spiritual court proceeded to deprivation, the court would prohibit them, but not till then. He said, he had known prohibitions denied frequently, to suits against parsons of donatives for marrying without licence. And the reporter says, Mr. Mead and Mr. Salkeld both told him, that they had known the chief justice Holt take the same distinction; that the parson of a donative was liable

liable to the ecclesiastical jurisdiction, as he was a member of the ecclesiastical body, for personal offences, tho' for matters relating to the church he was exempt; and therefore the spiritual court could not deprive him: but for drunkenness, or preaching heresy, they might censure him. And this (saith the reporter) seemeth to be the better opinion. *L. Rym.* 1205.

So in the case of churchwardens, *M. 13 G. Castle and Richardson*. On a libel in the ecclesiastical court for not taking upon him the office of chapel-warden; the defendant pleaded, that it was a donative, and thereupon moved for a prohibition. And upon debate, the same was denied; the whole court being of opinion, that tho' there was a difference as to the incumbent, yet as to the parish officers there was none; for they are the officers of the parish, and not of the patron of the donative. *Str.* 715. (e)

And as to donatives augmented by the governors of queen Anne's bounty, it is enacted by the 1 G. ft. 2. c. 10. as followeth: *Whereas the late queen Anne's bounty to the poor clergy was intended to extend not only to parsons and vicars who come in by presentation or collation, institution, and induction; but likewise to such ministers who come in by donation, or are only stipendiary preachers or curates, most of which are not corporations, nor have a legal succession, and therefore are incapable of taking a grant of conveyance of such perpetual augmentation as is intended by the said bounty; and in many places it would be in the power of the donor, impropiator, parson, or vicar, to withdraw the allowance which was before paid to the curate or minister serving the cure; or in case of a chapelry, the incumbent of the mother church might refuse to employ a curate, and officiate there himself and take the benefit of the augmentation, whereby the maintenance of the curate would be sunk instead of being augmented; it is therefore enacted, that all such churches, curacies, or chapels, which shall be augmented by the governors of the said bounty, shall be from thenceforth perpetual cures and benefices, and the ministers duly nominated and licensed thereunto shall be in law bodies politic and corporate and have perpetual succession, and be capable to take in perpetuity; and the impropiators or patrons of any augmented churches or donatives, and the rectors and vicars of the mother churches whereunto such augmented curacy or chapel doth appertain, shall be excluded from receiving any profit by such augmentation, and shall pay to the ministers officiating*

(e) 1 Barn. B. R. 5. S. C.

Donative.

such annual and other pensions and salaries, which by ancient custom or otherwise, of right, and not of bounty, they were before obliged to pay. s. 4.

And for continuing the succession in such augmented cures, hereby made perpetual cures and benefices, and that the same may be duly and constantly served; if they shall be suffered to remain void for six months, they shall lapse in like manner as presentative livings. s. 6, 7.

And all such donatives, which at the time of their augmentation are exempt from all ecclesiastical jurisdiction, shall by such augmentation become subject to the visitation and jurisdiction of the bishop of the diocese wherein such donative is. s. 14.

Provided, that no donative shall be augmented without the consent of the patron in writing under his hand and seal. s. 15.

Goes to the heir
and not to the
executor.

11. In the case of *Repington* against the *Governors of Tanworth school*. E. 3 G. 3. A person being seised of the advowson of a donative, the church in his life-time becomes void; then he dies, the church being still void. By his will he made the plaintiff executor, who brought a quare impedit, supposing himself intitled to this turn, as an executor is in the case of a presentative benefice. After two arguments in the court of common pleas, the whole court was clearly of opinion, that the right of donation descended to the heir at law; and that the executor had no title, which he would have had, if it had been a presentative benefice. 2 *Wilson*, 150.

How far of tempo-
ral cogni-
sance.

12. It was said in the case of *Spratt and Nicholson*, Godb. 196. that if issue be joined, whether donative or presentative, it shall be tried by a jury at the common law: and elsewhere it is said, that if the patron of a donative being disturbed in collating, recover by quare impedit, the writ shall be directed to the sheriff, to put the clerk in possession. *Gibbs*. 820. (p)

For if the patron of a donative is disturbed in collating his clerk, he may have a quare impedit against the bishop and the disturber; but the declaration in such a case must be special. *Deq. p. 1. c. 13.*

And a mandamus will lie, to admit or restore the donee. *Burrow, Mansf.* 1043. (q)

13. Lord

(p) 14 H. 4. 11. b. cited in *Powel v. Milbourne*, 3 *Willk.* 355.

(q) A mandamus cannot now be obtained in this case, the party having a specifick remedy by quare impedit. And such

13. Lord Coke says, if the patron of a donative doth ^{How extinguish-} once present to the ordinary, and his clerk is admitted and instituted, it is now become presentable, and never shall be a donative after. But a presentation to such a donative by a stranger, and admission and institution thereupon, is merely void. 1 Inst. 344. (r)

But in the case of *Ladd and Widdows, M. 1 An.* Upon motion for a new trial in a quare impedit, wherein the point in issue was, whether the church was donative or presentative, evidence was pleaded of several presentations: and the court, viz. Holt chief justice and Powell justice, held, that tho' a presentation might destroy an impropriation, yet it could not destroy a donative; because the creation thereof was by letters patent, whereby land is settled to the parson and his successors, and he to come in by donation. 2 Salk. 541.

Door into the churchyard. See Church.

Double quarrel.

DUPLEX querela (double *querela* or complaint, called improperly *double quarrel*) is a complaint made by any clerk or other, to the archbishop of the province, against any inferior ordinary, for delaying justice in any cause ecclesiastical, as to give sentence, or to institute a clerk presented, or such like. The effect of which is, that the archbishop, taking knowledge of such delay, directs his letters under his authentick seal to all and singular clerks of his province, thereby commanding and giving authority to them and every of them, to admonish the said ordinary within a certain time (as for instance nine or fifteen days) to do the justice required; or otherwise to cite him to appear before him or his official at a day in the said letters prefixed, and there to alledge the cause of his delay; and lastly, to intimate to the said ordinary,

such an application will be dismissed with costs. 1 T. Rep. 396. the *King v. Bishop of Chester*. See *Curates*, 4 & 10., and *Abbottson*, 14.

(r) *F. N. B.* 35. *Gro. Ja.* 63.

Drunkenness.

that if he performs not the thing enjoined, nor appears at the day assigned, he will proceed to do justice in the premises. And it seems to be called a *double querelle*, because it is most commonly made both against the judge, and against the party at whose request justice is delayed by the said judge. *Terms of the L. Clarke, Tit. 84, 85, 86.*

The process, form, and manner of trial in which suit, is treated of under the title *Benefice*.

Drunkenness.

Drunkenness by 1. Can. 109. I F any offend their brethren by drunkenness; the churchwardens or questmen

and sidemen in their next presentment to their ordinaries, shall present the same, that they may be punished by the severity of the laws, according to their deserts; and such notorious offenders shall not be admitted to the holy communion, till they be reformed.

Penalty of suffering tipling by the statute law.

2. By the 1 J. c. 9. 4 J. c. 5. 21 J. c. 7. and 1 C. c. 4. If any inn-keeper, victualler, or alehouse keeper, or tavern keeper or seller of wine, keeping an inn or victualling house, shall permit any person to continue drinking or tipling therein; (other than such as be invited by any traveller, and shall accompany him only during his necessary abode there; and other than labouring and handicraftsmen in market towns, upon the usual working days, for one hour at dinner time, to take their diet in an alehouse; and other than labourers and workmen, which for the following of their work shall sojourn there; and other than for urgent and necessary occasions to be allowed by two justices of the peace;), he shall forfeit 10s to the poor: the same offence being viewed by the mayor or a justice of the peace, or proved before them by one witness, or confession of the party; and after such confession, the oath of the party so confessing shall be taken against any other offending at the same time.

And he shall also be disabled from keeping any such alehouse for the space of three years.

The said penalty to be levied by the constables or churchwardens by distress; and for default of satisfaction within six days, the same to be appraised and sold; and for want

of sufficient distress, the party to be committed to the common gaol, till the said penalty be truly paid.

And if the constables or churchwardens do neglect their duty in levying, or do not levy the same; or in default of distress, do neglect to certify such default, for 20 days; they shall forfeit respectively 40s to the poor, by distress, by warrant of such justice or mayor; and if not paid in six days, the distress to be appraised and sold; and for want of sufficient distress, to be committed to the common gaol until the said penalty be truly paid.

Provided, that the correction and punishment of such as shall offend herein within the two universities, shall be ministered in this behalf by the governors, magistrates, justices of the peace, or other principal officers thereof, to whom in other cases the administration of justice and correction and punishment of offenders by the laws of this realm and their several charters doth belong; and the said forfeitures to be levied by officers to be from time to time appointed by the vicechancellors: and all powers and authorities either of imprisonment or otherwise hereby appointed, shall by the governors, magistrates, and principal officers aforesaid of either of the said universities, be duly executed and done within the said universities, and the liberties and precincts thereof, according to the true intent and meaning hereof.

Also the said offences may be inquired of and presented before the justices of assize, justices of the peace in their sessions, and before the mayors of cities and towns corporate who have power to inquire of trespasses, riots, routs, forces, and such like offences, and in every court leet; and such proceeding shall be had thereupon as upon indictment or presentment.

And all constables, churchwardens, headboroughs, tythingmen, aleconners, and sidemen, shall in their oaths incident to their offices, be charged to present the said offence.

3. By the 4 J. c. 5. 7 J. c. 10. and 21 J. c. 7. If any ^{Tipling.} person shall continue drinking or tippling in any inn, victualling house, or alehouse, or any tavern keeping an inn or victualling house, and the same be viewed and seen by any mayor or justice of the peace, or duly proved as is before mentioned in the case of persons suffering tipling (unless it be in such cases as in the said instance are also tolerated); he shall forfeit 3 s 4 d to the poor, to be levied in like manner: and if he be not able to pay, then the mayor, justice, or justices of the peace or court where the conviction shall be, shall punish him by setting him in the stocks for four hours.

And

Drunkenness.

And if any alehouse keeper shall be convicted of such offence, he shall be disabled to keep any such alehouse for the space of three years.

And all constables, churchwardens, headboroughs, tythingmen, aleconners, and sidemen, shall in their oaths incident to their offices be charged in like sort to prevent the said offence.

Provided, that this shall not in any wise abridge or restrain the ecclesiastical power or jurisdiction: but that all ordinaries, and other ecclesiastical judges and officers, may proceed to enquire of, censure, and punish all such offenders, according to the ecclesiastical laws of this realm, as before they might lawfully do.

And provided, that offenders having been once punished by any the ways and means before limited, shall not afterwards be punished for the same by any other ways or means.

And provided, that nothing herein shall be prejudicial to either of the universities; but that the chancellor, masters, and scholars, and their successors, may enjoy all their jurisdictions, rights, privileges, and charters as heretofore they have or might have done.

Also provided, that no person be molested for such offence, but within six months after the offence committed.

Drunkenness.

4. He who is guilty of any crime through his voluntary drunkenness, shall be punished for it as much as if he had been sober. 1 *Haw.* 2. (1)

By

(1) 4 *Rep.* 125. a. *Co. Lit.* 247. *Plowd.* 19. a. 1 *Hale* *H. P. C.* 32. with which the civil law agrees: see the authorities quoted by Sir M. Hale. Although a text cited by Mr. J. Blackstone, 4 *Com.* 25. seems to indicate the contrary. The two principal passages of the Digest, from which it may be inferred that drunkenness was admitted as an excuse for crimes, relate to the *military*, to whom a greater licence seems to be allowed. They are as follow: *Per vinum aut lasciviam lapsus capitalis pœna remittenda est, et militiæ mutatio irroganda. Dig.* 49. 16. 6. *De re militari. Salvo quoque legato Aquitanie idem princeps (Divus Hadrianus) rescripsit: in eum qui custodiam (reorum) dimisit, aut ita sciens habuit ut possit custodiam evadere, animadvertendum: si tamen per vinum aut desidiam custodiam id evenerit, castigandum eum, et in deteriorem militiam dare. Dig.* 48. 3. 12. *De custodia et exhibitione reorum.* In a law of the Code, *lib. 9. tit. 7.* the emperors Theodorus, Arcadius, and Honorius, declare that they will not punish the "obtretores temporum," or railers at the times, if their turbulence proceeded from drunkenness; but that intoxication

By the 4 J. c. 5. 7 J. c. 10. 21 J. c. 7. and 1 C. c. 4. Every person who shall be drunk, and of the same offence of drunkenness shall be convicted in like manner as aforesaid; shall forfeit 5s, to be paid within one week next after his conviction, to the churchwardens, to the use of the poor: and if he shall refuse to pay the same as aforesaid, then the same shall be levied of the goods of the offenders, by warrant from the same court, judge, justice, or justices, before whom the conviction shall be: and if he be not able to pay the said sum of 5s, he shall be committed to the stocks for the space of six hours.

And for the second offence, he shall be bound with two sureties in a recognizance or obligation of 10l, to be from thenceforth of good behaviour.

And if any alehouse keeper shall be convicted of such offence, he shall be disabled to keep any such alehouse for the space of three years.

And any justice of the peace, or head officer in a city or town corporate, shall have power on his view, or confession, or oath of one witness, to convict any person of the said offence; and for the second offence shall bind him to good behaviour, as if he had been convicted in open sessions.

And if any constable or other inferior officer, to whom it shall be given in charge by the precept of any mayor or justice of the peace, do neglect the due correction of the offender, or the due levying of the penalties; he shall forfeit 10s to the use of the poor of the parish or place where the offence shall be committed, to be levied by distress by any other person having warrant from any mayor, justice of the peace, or court where such conviction shall be, and to be paid to the churchwardens, who are to account for the same to the use aforesaid.

And all constables, churchwardens, headboroughs, tythingmen, aleconners, and sidemen, shall in their oaths

cation could not be urged as an excuse for crimes. See *Mathews de Criminibus, Proleg. cap. 2. § 14. Et du Paup, c. 4. § 8. & seq.* Though if accidental it was thought to lessen the guilt of the offender, by removing the supposition that he was actuated by malice; as on the other hand, if it proceeded from a depraved habit, or was resorted to in order to produce a greater degree of boldness, it was justly held to increase it. *Id.*

incident

incident to their offices be charged in like sort to prevent the said offence.

Provided that this shall not in any wise abridge or restrain the ecclesiastical power or jurisdiction; but that all ordinaries, and other ecclesiastical judges and officers, may proceed to enquire of, censure, and punish all such offenders, according to the ecclesiastical laws of this realm, as before they might lawfully do.

And provided, that the offenders having been once punished by any the ways and means before limited, shall not afterwards be punished for the same by any other ways or means.

And provided, that nothing herein shall be prejudicial to either of the universities; but that the chancellor, masters, and scholars, and their successors, may enjoy all their jurisdictions, rights, privileges, and charters, as heretofore they have or might have done.

Also provided, that no person be molested for such offence; but within six months after the offence committed.

M. 8 Car. Cucke and Starre. Prohibition was prayed to the spiritual court, to stay a suit there for defamation, for these words, "Thou art a drunkard," or "a drunken fellow." And by the opinion of Croke, Jones, and Berkley, a prohibition was granted: for these words do not concern any spiritual matter, but merely temporal, and are but a temporal slander, and a common phrase of brawling, for which there ought not to be a suit in the spiritual court. And so it was held in *Martin Calthorpe's* case in the common pleas. But *Richardson* doubted thereof; because the spiritual court, as well as temporal, may meddle with the punishment of drunkenness: so it is not merely temporal. But he assented to the grant of a prohibition; and the party may after declaration, if he will, demur thereto. Whereupon a prohibition was granted. *Gre. Car. 285.*

5. In the 8th year of king James the first, one *Parker* a clergyman was deprived of his benefice by the spiritual court for drunkenness; and though he prayed a prohibition, yet it was denied him. *Brownl. 37.*

And in the next year, another was deprived for the like cause; and the judges at common law allowed the sentence to be good. *Ayl. Parerg. 232. (1)*

(1) See Deprivation, in the notes.

6. By the 22 G. 2. c. 33. Art. 2. All flag officers, ^{Persons in the} and all persons in or belonging to his majesty's ships or vessels of war, being guilty of drunkenness, shall incur such punishment as a court martial shall think fit to impose, and as the nature and degree of their offence shall deserve.

Duplex querela. See Double quarrel.

Election of Bishops. See Bishops.

Elopement. See Marriage.

Ember days. See Holidays.

Endowment of churches. See Church.

Endowment of vicarages. See Appropriation.

English service. See Public Worship.

Effoin (u).

ESSOIN, *exonium*, is derived of the French *essonier* or *exonier*, which signifieth to excuse; so as an effoin, in legal understanding, is an excuse of a default by reason of

(u) An effoin is an excuse by which the plaintiff as well as defendant might save his default. For the ancient doctrine of these, see *Bract. lib. 5. t. 2. Brit. c. 122. Fleta, lib. 6. and Mr. Reeves's Hist. Eng. Law*. In real actions a man might also be effoined for constraint of enemies, falling amongst thieves, floods, &c. but this liberty grew into abuse, and effoins were often falsely cast, to impede the course of justice; several statutes were therefore made to restrain them. See 3 Ed. 1. cap. 42, 43, 44. 6 Ed. 1. cap. 8. 10. 13 Ed. 1. cap. 17. 27, 28. 12 Ed. 2. stat. 2. The first day of term is regularly the effoin day; but three effoins being formerly allowed, three days of grace are now allowed, so that an appearance may be entered on the *quarto die post*, when the courts meet for the dispatch of business. 3 Bl. Com. 278.
But

Evidence.

of some impediment or disturbance, and is as well for the plaintiff as for the defendant; and is all one with what the civilians called *excusatio*. Of essoins there have been five kinds, 1. De servitio regis. 2. In terram sanctam. 3. Ultra mare. 4. De malo lecti; in our old books called, *essonium de resiantia*. 5. De malo veniendi; and this last is the common essoin. 2 *Inst.* 125.

Eve. See Holidays.

Evidence.

One witness
how far evi-
dence.

1. A Single witness is not sufficient in the civil law; and the spiritual court will not allow of one witness only, but there must be two witnesses at the least; and if the point is merely spiritual, the temporal courts will not grant a prohibition. *Gibf.* 1011. (w)

For

But though the *quarto die post* is, in common language, the first day of term, judgments and other legal proceedings relate to the essoin day. 3 *Salk.* 345. When the defendant must appear in person, when he may appear by attorney, and how an appearance can be compelled, see the books of practice.

(w) The canonists have borrowed this, as they have most of their rules of evidence, from the civil law, which does not permit a single witness to be heard. *Unius testis responsio non audiat utiam si præclara curia honore præfulgeat. Cod.* 4. 20. 9. *Dig.* 22. 5. 12. A cause therefore which rested on the testimony of a single witness, uncorroborated by any other evidence, was to be dismissed without tendering the suppletory oath. *Noodt ad Dig.* 22. 5. But a complete proof might be adduced without any witness, by deeds or instruments; and the evidence of one witness corroborated by circumstances, or circumstances without a witness, furnish conclusive proof in crimes as well as civil actions. See *Huber ad Dig. de Testibus* and *Matheus de criminibus, cap. de Probationibus*. This title is most important in law, but to discuss it with accuracy would swell this volume beyond its proper limits: the reader must therefore consult for the rules of the civil and canon law, the interpreters on the titles of the Digest and Code above cited, together with *Inst.* J. C. 3. 14.; and for the English law, *Gilbert's Law of Evidence*; *Buller's Law of Nisi Prius*; *Esplanasse's* Ditto;

For where the ecclesiastical court doth proceed in a matter that is merely spiritual, and pertinent to their court, according to the civil law, although their proceedings are against the rules of the common law, yet a prohibition doth not lie: as if they refuse a single witness to prove a will; for the cognizance of that belongs to them. *God. Rep.* 115.

Which same thing was affirmed in *Roberts's case*, *H. 8 J.* with regard to points not otherwise cognizable in the spiritual courts, than as incidental to the principal point. There the suit was for substraſtion of tithes, and prohibition was obtained, because there was but one witness to prove the lease of the tithes, and the spiritual court would not allow the proof. And upon advisement in this case, by Coke and all the justices, it was resolved, that consultation should be awarded; because there is a rule in the register, that where the cognizance of the principal is, there the cognizance of the accessory necessarily follows. And if such surmise should be allowed in every case, it would oftentimes be made for mere delay, and the spiritual court should not try the accessory as well as principal. And the conclusion is,—when the original cause belongs unto them, although matter triable at the common law ariseth, depending upon the original cause, yet it shall be determined by the ecclesiastical court: and such surmise, that he had but one witness, is not sufficient to have a prohibition, where the ecclesiastical court hath jurisdiction of the principal: for if such a surmise should be sufficient, all suits in the ecclesiastical court should thereby be stayed, or otherwise taken away; for the ecclesiastical judges cannot write to the temporal judges to try it, and certify; as the temporal judges, where the original matter belongs to and is commenced in their courts, and issue is taken upon matter triable by the ecclesiastical law, may write to the judges of the ecclesiastical court to try the matter, and certify to them. *Cro. Ja.* 269. *12 Co.* 65.

But in the case of *Richardson and Desborough*, *H. 27 & 28 Q. 2.* a prohibition was prayed, because the spiritual court refused the proof of *plene administravit* by one witness; and it was granted: and Hale chief justice said,

Ditto; the Abridgments, (particularly Viner's,) tit. *Evidence*; 2 Hawk. P. C. Ch. 46.; Treatise of Equity edited by Mr. Fonblanque, vol. 2. p. 447; and the Reports of Decisions as *Nisi Prius*.

where

where the matter to be proved (which falls in incidentally in a cause before them in the spiritual court) is temporal, they ought not to deny such proof as the common law allows. 1 *Ventr.* 291.

And in *Shutter and Friend, H. 1 W.* a prohibition was prayed and obtained, because the spiritual court would not allow the proof of the payment of a legacy by one witness. Upon which occasion the court said, — such proof which is good at the common law ought to be allowed in their court; and at the common law it is not necessary to prove the payment of a debt by two witnesses: they may follow their own rules, in things which are originally in their cognizance; but if any collateral matter doth arise, as concerning the payment of a legacy, if the proof be by one witness, they ought to allow it. 2 *Salk.* 547. 3 *Mod.* 283.

And in the case of *Breedon and Gill, E. 9 W.* By Holt chief justice; as to the course of granting prohibitions, for not allowing evidence which would be good at the common law, the difference is thus: when the ecclesiastical courts are possessed of a cause, which is merely of spiritual cognisance, the courts at common law allow them to pursue their own methods in the determination of it; but when in such cause collateral matter arises, which is not of their cognisance properly, there the courts of common law inforce them to admit such evidence as the common law would allow. Therefore if the spiritual court require more than one witness, to prove the revocation of a nuncupative will, the king's bench doth not intermeddle. But if in a suit for a legacy, payment or a release be pleaded, if they do not admit proof by one witness, the king's bench grants a prohibition. *L. Ray.* 221.

Depositions and
sentence in the
ecclesiastical
court.

Probate of a
will.

2. Depositions taken in the ecclesiastical court (altho' the witnesses be dead) are not evidence in an action brought at common law; but a sentence given in the ecclesiastical court (it being a judicial act) may be given in evidence in an action brought in the temporal courts. *Wals.* c. 58. (x)

3. *H. 8 W. Hoe and Nelbrope.* It was held by Holt chief justice, that a copy of a probate of a will is good evidence, where the will itself is of chattels; for there the probate is an original taken by authority, and of a public nature; otherwise, where the will is of things in the realty, because in such case the ecclesiastical courts have

(x) See *Marriage, X. 6.*

no authority to take probates, therefore such probate is but a copy, and a copy of it is no more than a copy of a copy. 3 *Salk.* 154.

4. It is required, that witnesses be persons of reputation, and free from infamy of law and fact; that they be disinterested, and so not liable to the just suspicion of partiality; that they be men of discretion, and sane memory: and all reasonable exceptions are to be allowed against them. They must be deliberate, and not given to passion; consistent as to time, place, and other circumstances. They must be certain and positive, and not upon hearsay or the belief of other persons. They must be free from any just suspicion of contrivance, or conspiracy, or any sort of corruption or partiality. 2 *Still.* 152. Qualification of witnesses.

And the canon law requires, that they shall not be father, son, brother, sister, or other near of kin, or domesticks and dependants. And if the matter to be proved be merely spiritual, the common law (as was said before) will not interfere; but if a temporal matter falleth incidentally in a cause in the spiritual court, they must admit such evidence as the common law allows of, otherwise they will be prohibited.

5. Cross examining a witness sets him upright before the court, so that the party afterwards cannot except to his credibility; but he may to his competency, if it should come out that he is interested, or the like. 2 *Chan. Ca.* 250. Cross examining.

6. It sometimes happens, that there is a deficiency in proof as to the identity: in such case, confronting of witnesses with the party, may be ordered after publication, and they may be cited in order thereto, and their declaration be taken down in the acts of court; but one witness to prove the identity is sufficient. Confronting in what case.

7. If a witness is once examined in general to the libel or allegation, and his deposition closed with an *aliter nescit*, or to any such effect, he cannot afterwards be re-examined, for fear of subornation. But where an examination taken has been lost or destroyed, it may be supplied by a new examination. So if ticketted to more articles than the examination takes in, he may be examined again to those omitted. So as to interrogatories; but then the re-examination must not be extended to the libel or allegation, but to the interrogatories only. Re-examining.

8. He that will produce witnesses that come at a great distance, ought to tender and allow them their expences: but the person against whom they are produced, is not bound to bear any part of those expences, altho' the witnesses are bound to testify the truth on both sides. And Expences of the witness.

Exchange.

these expences are to be tendred and paid to them before they depart from home, without any regard had to what such witnesses might have spent in their own houses; but it ought to be considered, what their journey or travelling expences may stand them in. And if such witness shall receive expences for ten days, and shall be dispatched in five, he shall be obliged to render back the overplus. *Ayl. Parerg.* 536.

If the party hath made no agreement with his witnesses for their journey and expences; they may then, before they are sworn, desire of the judge to order them their expences: which he shall tax and allow, according to the condition of the parties, the time, and the distance; and decree the same to be paid before they shall be examined; or, if the witnesses desire the same, he may decree a motion to the party producing the witnesses, to pay the same; which if the said party shall refuse, he may be proceeded against to excommunication. 1 *Ought.* 121.

Examination of clerks before institution.
See *Benefice*.

Examination of persons to be ordained.
See *Ordination*.

Exchange.

EXCHANGE is, where two persons, having procured licence from the ordinary to treat of an exchange (of which sort there are many to be found in the ecclesiastical records) do by one instrument in writing, agree to exchange their benefices being both spiritual, (for a lay preferment, as an hospital, cannot be exchanged or go for a prebend or other spiritual benefice,) and in order thereunto, do resign them into the hands of the ordinary: such exchange being executed, the resignations are good. *Watf. c. 4. Gibf.* 821.

But tho' the one is instituted and inducted into the other's benefice, yet if the exchange be not executed on both parts, the clerk on whose part the exchange was not executed may have his benefice again; for in this case of exchanging, the law doth annex this condition to a resignation, viz. if it be fully executed. *Watf. c. 4.*

Thus

Thus where one is both instituted and inducted, and the other is only instituted, and dies or refuses to finish; in this case, tho' they have proceeded so far, yet the resignation and all that followed upon it shall be void, and both (if both are living) may return to their former benefices upon the foot of former possession; or if one dies before he is inducted, and after the induction of the other, this induction and all that went before shall be void, because the exchange was not fully executed during the lives of the parties. *Gibf.* 821.

And this is agreeable to the reason of the common law: for at the common law if a man exchange lands, and the lands he receives in exchange be evicted, he may repair to his own lands, and re-enter upon them. *Dec. p. 1. c. 14.*

By the 31 El. c. 6. s. 8. *If any incumbent of any benefice with cure of souls, shall corruptly resign or exchange the same; or corruptly take for or in respect of the resigning or exchanging the same, directly or indirectly, any pension, sum of money, or other benefit whatsoever: as well the giver, as the taker, of any such pension, sum of money, or other benefit corruptly, shall lose double the value of the sum so given, taken, or had; half to the queen, and half to him that shall sue for the same in any of her majesty's courts of record.*

Exchange of glebe lands. See **Glebe Lands.**

Excommunication.

1. **E**Xcommunication is an ecclesiastical censure, where-^{What.} by the person against whom it is pronounced is, for the time, cast out of the communion of the church. *God.* 624.

2. And it is of two kinds, the lesser and the greater: ^{Lesser.} The lesser excommunication is, the depriving the offender of the use of the sacraments and divine worship; and this sentence is passed by judges ecclesiastical, on such persons as are guilty of obstinacy or disobedience, in not appearing upon a citation, or not submitting to penance, or other injunctions of the court. *Johns.* 168.

3. The greater excommunication is that whereby men ^{Greater.} are deprived, not only of the sacraments, and the benefit of divine offices, but of the society and conversation of the faithful. *Johns.* 168.

Excommunication.

If a person be excommunicated generally; as if the judge say, *I excommunicate such a person*; this shall be understood of the greater excommunication. *Lindw.* 78.

Ipsa facto.

4. The law in many cases inflicteth the censure of excommunication *ipso facto* upon offenders; which nevertheless is not intended so as to condemn any person without a lawful trial for his offence: but he must first be found guilty in the proper court; and then the law gives that judgment (y).

And there are divers provincial constitutions, by which it is provided, that this censure shall not be pronounced (in ordinary cases) without previous monition or notice to the parties, which also is agreeable to the ancient canon law. *Gibf.* 1046. 1048. (z)

Body corporate cannot be excommunicated.

5. A body corporate, or whole society together, cannot be excommunicated, for this might involve the innocent with the guilty; but such persons only of the society as are guilty of the crime, are to be excommunicated severally. *Gibf.* 1048. (a)

Excommunicate person deprived of christian communion.

6. By a constitution of archbishop Stratford: *Excommunicate persons shall be inhibited the commerce and communion of the faithful; and they who communicate with them shall be punished by ecclesiastical censure.* *Lind.* 266.

Commerce] That is, buying or selling, or other interchange of wares or merchandize. *Lind.* 266.

By ecclesiastical censure] That is, by the lesser excommunication, if they have not been admonished to desist; and by the greater excommunication, if they have been admonished, and have not desisted. *Lind.* 266.

And by Art. 33. *That person, which by open denunciation of the church is rightly cut off from the unity of the church, and excommunicated, ought to be taken, of the whole multitude of the faithful, as an heathen and publican; until he be openly reconciled by penance, and received into the church by a judge that hath authority thereunto.*

(y) Thus by 5 and 6 *Ed.* 6. c. 4. § 2. every person who shall smite or lay violent hands upon another in any church, or church-yard, shall be deemed *ipso facto* excommunicate; yet a defendant cannot plead excommunication in a plaintiff without shewing either a sentence of excommunication by the ordinary, or a conviction at law. See *Church*, X. 8. and where the canonists speak of an excommunication *ipso facto*, they are unanimous that a declaratory sentence is necessary. *Gib. Cod.* 1049. *Vid. Deprivation, in the notes.*

(z) *Lind.* 348.

(a) 6°. 5. 11. 5.

And

And this is according to the ancient rule of the church: And it was further ordained by many other ancient constitutions of the church, that if a person excommunicated in one city or diocese went to another, whoever received him to communion, should be also excommunicate; for which reason no strangers were to be received to communion, till they shewed their letters of recommendation: And the same was made part of our english constitution, in the council of London, in the year 1126, that no person shall presume to receive to communion any stranger excommunicate; and if any shall knowingly do so, he himself shall be deprived of christian communion, *Gibf.* 1049.

7. By *Can.* 85. The churchwardens or questmen especially shall see that all persons excommunicated, and so denounced, be kept out of the church. To be kept out of the church.

And if a clergyman presume to officiate, after he is excommunicated, the canon law orders him to be deprived. *Gibf.* 1049. (b)

8. In the ancient church, the sentences of the greater excommunication were solemnly promulged four times in the year; with candles lighted, bells tolling, the cross and other solemnities. *Lind.* 355. To be publicly denounced every six months.

And by *Can.* 65. All ordinaries shall, in their several jurisdictions, carefully see and give order, that as well those who for obstinate refusing to frequent divine service established by publick authority within this realm of England, as those also (especially those of the better sort and condition) who for notorious contumacy or other notable crimes stand lawfully excommunicate, (unless, within three months immediately after the said sentence of excommunication pronounced against them, they reform themselves, and obtain the benefit of absolution,) be every six months ensuing, as well in the parish church as in the cathedral church of the diocese in which they remain, by the minister openly in time of divine service upon some Sunday, denounced and declared excommunicate, that others may be thereby both admonished to refrain their company and society, and excited the rather to procure out a writ de excommunicato capiendo, thereby to bring and reduce them into due order and obedience. Likewise the register of every ecclesiastical court, shall yearly between Michaelmas and Christmas, duly certify the archbishop of the province of all and singular the premisses aforesaid.

Disabled to
bring an action.

9. Where a man is excommunicate by the law of holy church, and he sueth an action real or personal, the defendant may plead, that he who sueth is excommunicated; and of this it behoves him to shew the bishop's letters under his seal, witnessing the excommunication, and ask judgment if he shall be answered. But in this case, if the plaintiff cannot deny it, the writ shall not abate, but the judgment shall be, that the defendant shall go quit without day; because when the plaintiff hath purchased his letters of absolution, and shewed them to the court, he may have a re-summons or re-attachment upon his original, according to the nature of his writ. *Litt. sect. 201. (c)*

And either the greater or lesser excommunication disableth the party. *1 Inst. 134.*

Yet every excommunication disableth not the party. Thus, if bailiffs and commons, or any other corporation aggregate of many, bring an action; excommunication in the bailiffs shall not disable them, for that they sue and answer by attorney; but otherwise it is of a sole corporation. *1 Inst. 134.*

And where it appeared in the bill, that the plaintiff was a recusant convict, and so as a person excommunicate; notwithstanding which, the defendant had answered him, and then prayed a prohibition, the court told him, that by answering he admitted him a person able, and it was then too late for that plea. And a prohibition was denied. *Gibb. 1050. Noy 88.*

Nor if a bishop be defendant, shall an excommunication by the same bishop against the plaintiff disable him. *1 Inst. 134.*

If executors or administrators be excommunicated, they may be disabled; because they which converse with a person excommunicate, are excommunicate also. *1 Inst. 134.*

It is intimated by Bracton, that a commissary or official in this case may testify the excommunication; but Lit-

(c) *Excommunicato interdicitur omnis actus legitimus; ita quod agere non potest, nec aliquem convenire, licet ipse ab illis possit conveniri. Bract. lib. 5. f. 426. b. Flet. lib. 6. c. 3^a. See also Frollop's case, 8 Rep. 68. This policy Mr. Justice Blackstone has traced to the ancient customs of our British ancestors as described by Cæsar, de Bell. Gall. lib. 6. by which those who were interdicted by the druids from their sacrifices, in numero impiorum ac sceleratorum habetur: ab iis omnes decedunt adiuturum corum sermonemque defugiunt ne quid ex contagione incommodi accipiant: neque iis presentibus jus redditur, neque bonos ullus communicatur. 3 Com. 102.*

dicton in the passage above recited nameth the bishop only. And Lord Coke saith; none can certify excommunication but only the bishop, unless the bishop be beyond sea or in parts remote; or one that hath ordinary jurisdiction, and is immediate officer to the king's courts; as the archdeacon of Richmond, or the dean and chapter in time of vacation. But in ancient time, every official or commissary might testify excommunication to the king's court; and for the mischief that ensued thereupon it was ordained by parliament, that none should testify excommunication, but the bishop only. 1 Inst. 134.

Of this power, as restrained to the bishop, Lindwood writeth thus: At the request of inferior prelates, the king useth not to write for the taking of excommunicates. Wherefore, if any be excommunicated by a person inferior to the bishop, as by the dean, or archdeacon: the invocation of the king's majesty ought to be made by the bishop; for they who are inferior to bishops cannot call in the secular arm, but the bishops shall execute their sentences; and if the bishops will not do this, they may be compelled thereunto by the archbishop. Lind. 350.

10. The rule of the canon law is that an excommunicate person shall not be presented to a benefice: and he who knowingly shall present an excommunicate person, shall be suspended from presenting to any benefice, until he shall have obtained absolution. Gibf. 1050. May not be presented to a benefice.

11. Neither by the canon law, can a person excommunicate be an advocate. Gibf. 1050. Nor be an advocate.

12. Whilst an excommunicate person is under that sentence, he is disabled to be a witness. Swin. 109. (d) Nor a witness.

13. It was anciently holden, that excommunication was a good cause of challenge against a juror; yet not principal, but only to the favour, unless the record of the judgment be produced. 2 Hcw. 418. Whether he may be a juror.

14. An excommunicate person may have the benefit of clergy. 2 Haw. 338. May have the benefit of clergy.

15. An excommunicate person may make a testament; unless he be excommunicated by the greater excommunication. Swin. 109. God. O. L. 37. Whether he may make a testament.

16. An excommunicate person may be appointed executor, and is capable of a legacy; yet pending the excommunication, he is not to be admitted by the ordinary, nor shall commence or prosecute any suit or action for his Whether he may be executor.

testator's goods: yet this doth not null his executorship, or quite destroy the action, but only suspends it until his absolution. *God. O. L. 37, 38. Swin. 367.*

shall not have
christian burial.

17. By *Can. 68*. If the minister refuse to bury any corps, except the party deceased were denounced excommunicated by the greater excommunication, for some grievous and notorious crime, and no man able to testify of his repentance: he shall be suspended by the bishop from his ministry for the space of three months.

But by the *rubrick* in the book of common prayer, *The burial office shall not be used for any that die excommunicate.*

Writ of excom-
municato capi-
endo.

18. Upon this head, it is proper to take notice of a confusion which runs thro' almost all the books, by reason of the ambiguous sense in which the word *Significavit* is used; sometimes to denote the bishop's certificate of the excommunication into the court of chancery. in order to obtain the writ de excommunicato capiendo; sometimes to denote that writ itself. In this latter sense it seemeth more properly to be applied; the writ having received its name, from this same word in the beginning of it.

By the law and custom of this realm, the person who remaineth forty days under the sentence of excommunication, shall at the request of his proper diocesan, be arrested and imprisoned by a writ of de excommunicato capiendo directed to the sheriff; but first there ought to be a certificate from such diocesan under his episcopal seal, signifying to the court of chancery the contempt of the party to holy church. *Lind. 350. Swin. 109.*

Which forty days are to be accounted after the minister hath published the excommunication in the church; which is done by virtue of an instrument he hath for that purpose, under the seal of the ecclesiastical court: and then if the person excommunicated doth not submit within forty days after the said publication, he may (after such certificate so made as aforesaid) be arrested upon the excommunicato capiendo. *Swin. 109.*

But tho' the bishop may certify not only an excommunication made by himself, but also an excommunication made by his commissary or official who doth it in his right, and by his archdeacon, whose jurisdiction is derived from him (in which case, the rule in the register is, that when the bishop signifieth any one to be excommunicate by authority of the archdeacon or official, it ought always to be said in the writ to be by the authority of that bishop or him who so certifieth); yet he may not certify that which hath been done in another court: and therefore a certificate,

cate, that another bishop hath certified him, or that he hath seen a sentence of excommunication made by another bishop, is of no force. *Gibf.* 1050. 1 *Inst.* 134.

. And if the bishop make a wrong certificate, he shall be liable to be made a party, and to pay costs. *Str.* 1190.

At the common law, a certificate of the bishop, whereupon a significavit was to be granted, ought to express the cause, and the suit against him, specially in the certificate; to the end the temporal judges may see, whether the spiritual court hath cognizance of the original cause, and whether the excommunication be according to law; that if it be otherwise, they may write to them to absolve the party. 2 *Inst.* 623.

For since it doth affect the liberty of a man's person, therefore it concerneth a temporal interest. 1 *Hale's Hist.* 409.

And the bishop having certified the excommunication under seal, albeit he dieth, yet the certificate shall serve. 1 *Inst.* 134.

Lord Coke says; the writ of excommunicato capiendo proceedeth only ex gratia regis. 2 *Inst.* 621.

On the contrary; Lindwood saith, this writ is grantable of right, ex debito. *Lind.* 351.

And by a constitution of archbishop Boniface, delivered in the wonted strain of that archbishop's constitutions; If the king deny the accustomed writ de excommunicato capiendo, his cities, castles, towns, and villages within that diocese, shall by the bishop be put under an interdict, until the same shall be granted. *Lind.* 351.

Dr. *Cofius* (with more moderation) saith concerning this writ, that it is a liberty or privilege peculiar to the church of England, above all the realms in Christendom that he hath read of, that altho' the assistance of the secular arm hath ever been afforded to the church in most other christian countries, as well as this, yet in no instance is it perhaps so surely and so effectually reached out, as in the execution of this writ, which is debitum justitiæ, and not made to depend upon the pleasure of the prince. For tho' in one place it is said by the king in the register, that it proceedeth on his grace; yet a note in the same book upon the same words teaches us, that such clause is only used in honour of the king, albeit he is bound to grant it de jure: and it is expressly said in the aforesaid writ, and in divers others, to issue according to the custom of England; or in other words, according to the common law of the realm. *Cof. Apol.* 8.

And

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And this seems to be agreeable to the tenure of the statute of Articuli cleri, 9 Ed. 2. *st.* 1. c. 12. where, to the complaint of the clergy in this respect, the king maketh answer; that the said writ was never yet denied, nor shall be hereafter.

And the expression in the statute of 2 & 3 Ed. 6. c. 13. concerning tithes, is, that the bishop may require process of excommunicato capiendo.

By the statute of the 5 Eliz. c. 23. *Forasmuch as divers persons offending in many great crimes and offences, appertaining merely to the jurisdiction and determination of the ecclesiastical courts and judges of this realm, are many times unpunished for want of due execution of the writ de excommunicato capiendo; the great abuse whereof, as it should seem, hath grown, for that the said writ is not returnable into any court that might have the judgment of the well executing and serving the said writ; but hitherto hath been left only to the discretion of the sheriffs and their deputies, by whose negligences and defaults for the most part the said writ is not executed upon the offenders as it ought to be; by reason whereof, such offenders be greatly encouraged to continue their sinful and criminal life, to the displeasure of almighty God, and contempt of the ecclesiastical laws of this realm; s. 1.*

Therefore it is enacted, that every writ of excommunicato capiendo, that shall be granted out of the high court of chancery, shall be made in the time of the term; and returnable in the king's bench in the term next after the teste of the same writ; and the same writ shall be made to contain at least twenty days between the teste and the return thereof: and after the same writ shall be so made, and sealed, it shall be forthwith brought into the court of king's bench, and there in presence of the justices shall be opened and delivered of record to the sheriff or other officer to whom the serving and execution thereof shall appertain, or to his or their deputy or deputies: and if afterwards it shall appear to the justices of the same court, that the same writ so delivered of record be not duly returned before them at the day of the return thereof, or that any other default or negligence hath been used or had in the not well serving and executing of the said writ, the said justices shall assess such amerciamment upon the said sheriff or other officer in whom such default shall appear, as to them shall seem meet, the same to be estreated into the exchequer, as other amerciaments have been used. s. 2.

And the sheriff or other officer to whom such writ of excommunicato capiendo, or other process by virtue of this act shall be directed, shall not in any wise be compelled to bring the
body

body of such person as shall be named in the said writ or process, unto the said court of king's bench at the day of the return thereof; but shall only return the same writ and process thither, with declaration briefly how and in what manner he hath served and executed the same. §. 3.

And if such sheriff or other officer shall return, that the party cannot be found within his bailiwick; the said justices of the king's bench shall award a writ of capias against the person named in the said writ of excommunicato capiendo; returnable in the same court in the term time, within two months at least after the teste thereof; with a proclamation to be contained in the said writ of capias, that the sheriff or other officer as aforesaid, in the full county court, or at the assizes or quarter sessions within the said county, shall make open proclamation ten days at least before the return, that the party named in the said writ shall, within six days next after such proclamation, yield his body to the prison of the said sheriff or other such officer, there to remain as a prisoner, according to the tenor and effect of the first writ of excommunicato capiendo, upon pain of forfeiture of 10l. And thereupon, after such proclamation had, and the said six days past and expired, the said sheriff or other officer shall make return of the same writ of capias into the said court of king's bench, of all that he hath done in the execution thereof, and whether the party named in the said writ have yielded his body to prison or not. §. 4.

And if upon the return of the said sheriff it shall appear, that the party named in the same writ of capias hath not yielded his body to the gaol and prison of the said sheriff or other officer, according to the effect of the same proclamation; every such person that shall so make default, shall for every such default forfeit to the king 10l; to be distrainted into the exchequer, as fines and amerciaments there taxed and assessed are used to be. §. 5.

And thereupon the said justices of the king's bench shall also award forth one other writ of capias against the said person that so shall be returned to have made default, with such like proclamation as was contained in the first capias, and a pain of 20l to be mentioned in the said second writ and proclamation. And the sheriff or other officer to whom the said second writ of capias shall be so directed, shall serve and execute the said writ, in such like manner and form as before is expressed for the serving and executing of the said first writ of capias. And if the sheriff or other officer shall return upon the said second capias, that he hath made the proclamation according to the tenor and effect of the same writ, and that the party hath not

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not yielded his body to prison according to the tenor of the said proclamation; then the said party that shall so make default, shall for such his contempt and default forfeit to the king the sum of 20l, to be distrained into the exchequer as aforesaid. l. 6.

And then the said justices shall likewise award forth one other writ of capias against the said party, with such like proclamation and pain of forfeiture as was contained in the said second writ of capias: And the sheriff or other officer to whom the said third writ of capias shall so be directed, shall serve and execute the said third writ of capias, in such like manner and form as before in this act is expressed for the serving and executing of the said first and second writs of capias: And if the sheriff or other officer to whom the execution of the said third writ shall appertain, do make return of the said third writ of capias, that the party upon such proclamation hath not yielded his body to prison, according to the tenor thereof; every such party, for every such contempt and default, shall likewise forfeit to the king other 20l, to be distrained in manner aforesaid. And thereupon the said justices of the king's bench shall likewise award forth one writ of capias against the said party, with like proclamation, and like pain of forfeiture of 20l. And also the said justices shall have authority infinitely to award such process of capias, with such like proclamation and pain of forfeiture of 20l, as is before limited, against the said party that so shall make default in yielding of his body to the prison of the sheriff: until such time as by return of some of the said writs before the said justices, it shall appear, that the said party hath yielded himself to the custody of the said sheriff or other officer, according to the tenor of the said proclamation: and the party upon every default and contempt by him made against the proclamation of any of the said writs so infinitely to be awarded against him, shall incur like pain and forfeiture of 20l, to be distrained in like manner. l. 7.

And when any person shall yield his body to the hands of the sheriff or other officer, upon any of the said writs of capias; he shall remain in the prison and custody of the said sheriff or other officer, without bail, in such manner and form as he should have done if he had been apprehended upon the writ of excommunicato capiendo. l. 8.

And if any sheriff or other officer by whom the said writs of capias or any of them shall be returned as is aforesaid, do make an untrue return upon any of the said writs, that the party named in the said writ hath not yielded his body upon the said proclamations, or any of them, where indeed the party did yield himself according to the effect of the same; every such sheriff or other officer, for every such false and untrue return, shall forfeit

fait to the party grieved the sum of 40l, to be recovered in any of the king's courts of record. s. 9.

Provided always, that in Wales, and the counties palatine of Lancaster, Chester, Durham, and Ely, and in the cinque ports, being jurisdictions and places exempt, where the king's writ doth not run, and process of capias from thence not returnable into the king's bench; after any significavit being of record in the said court of chancery, the tenor of such significavit by mittimus shall be sent to such of the head officers of the said country of Wales, counties palatine, and places exempt, within whose jurisdiction the offenders shall be resiant; that is to say, to the chancellor or chamberlain for the said county palatine of Lancaster and Chester, and for the cinque ports to the lord warden of the same, and for Wales and Ely and the county palatine of Durham to the chief justice or justices there: and thereupon every of the said justices and officers to whom such tenure of significavit with mittimus shall be directed and delivered, shall have power to make like process to the inferior officers to whom the execution of process there doth appertain, returnable before the justices there, at their next sessions or courts, two months at the least after the issue of every such process: so always, as in every degree they shall proceed in their sessions and courts against the offenders as the justices of the said court of king's bench are limited by the tenor of this act in term times to do and execute. s. 11.

Provided also, that any person at the time of any process of capias aforementioned awarded, being in prison, or out of this realm in the parts beyond the sea, or within age, or of non-sane memory, or woman covert, shall not incur any of the pains or forfeitures aforementioned, which shall grow by any return or default happening, during such time of non-age, imprisonment, being beyond sea, or non-sane memory; and the party grieved may plead every such cause or matter in bar of and upon the distress or other process that shall be made for levying of any of the said pains or forfeitures. s. 12.

And if the offender against whom any such writ of excommunicato capiendo shall be awarded, shall not in the same writ have a sufficient and lawful addition; or if in the significavit it be not contained, that the excommunication doth proceed upon some cause or contempt of some original matter of heresy, or refusing to have his child baptized, or to receive the holy communion as it is now commonly used to be received in the church of England, or to come to divine service now commonly used in the said church of England, or error in matters of religion or doctrine now received and allowed in the said church of England, incontinency, usury, simony, perjury in the ecclesi-

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ecclesiastical court, or idolatry: that then all and every the pains and forfeitures limited against such persons excommunicate by this statute, by reason of such writ of excommunicato capiendo wanting sufficient addition, or of such significavit wanting all the causes aforementioned, shall be utterly void in law; and, by way of plea, to be allowed to the party grieved. s. 13.

If the addition shall be with a nuper of the place, in every such case at the awarding of the first capias with proclamation according to the form mentioned, one writ of proclamation (without any pain expressed) shall be awarded into the county where the offender shall be most commonly resident at the time of the awarding of the said first capias with pain, in the same writ of proclamation, to be returnable the day of the return of the said first capias with pain and proclamation thereupon, at some one such time and court, as is prescribed for the proclamation upon the said first capias with pain: and if such proclamation be not made in the county where the offender shall be most commonly resident in such cases of addition of nuper; every such offender shall sustain no pain or forfeiture by virtue of this statute, for not yielding his body according to the tenor aforementioned; any thing before specified, and to the contrary hereof, in any wise notwithstanding. s. 14.

S. 2. *It shall be forthwith brought into the court of king's bench, &c.]* It hath been often adjudged, that this form of taking out the writ, and the several steps therein (as contained in this clause of the act) ought to be precisely pursued; and for default thereof many persons have been discharged. *Gibf. 1056. (c)*

Into the court of king's bench] In the bishop of St. David's case, *M. 1 Ann.* it was declared, that before this statute, the writ was returnable into chancery; and there the *significavit* was quashed, if undue: but now the judgment of that, by this statute, is devolved on the court of king's bench. *Farrell. 57.*

S. 4. *Capias]* The penalties of this act being inflicted upon none but those who are excommunicated for some of the causes specified in s. 13. the capias accordingly must not be with penalty in any other case: or if it issue so by mistake, the court will grant a superedeas upon motion; and if the party be taken, will upon pleading (after the habeas corpus is granted and returned, and so the matter is judicially before them) discharge him from the penalties, tho' not from the imprisonment. In consideration of which

(c) *Cro. Ja. 566. Cro. Car. 583. Siderf. 165. 285.*
pleading,

pleading, and the trouble and charge that attends it; it is said, that he may have an attachment against the plaintiff. *Gibf.* 1056. *1 Salk.* 294.

S. 8. *He shall remain in the custody of the said sheriff]*
T. 1 An. Slipper and Mason. The plaintiff obtained sentence against the defendant for 210 l, for non payment of tithes and costs. The defendant for non payment was excommunicated, and arrested upon an excommunicato capiendo, and the sheriff let him escape. The plaintiff brought a special action against the sheriff; and had a verdict against him for the 210 l. It was moved in arrest of judgment, that the action would not lie. But by the court it was adjudged, that the action well lay: and they relied much upon the case, where it was held, that an action lies against the sheriff for suffering a man to escape, being arrested upon a *capias utlagatum* after outlawry upon *mesne process.* *L. Raym.* 788.

S. 8. *Without bail]* By the statute of the 3 *Ed. 1. c. 15.* persons excommunicate, taken at the request of the bishop, shall be in no wise replevisable, by the common writ, nor without writ.

That is to say, he that is certified into the chancery by the bishop to be excommunicated, and after is taken by force of the king's writ of *excommunicato capiendo*, is not bailable: for in ancient time, men were excommunicated only for heresies *propter lepram animæ*, or other heinous causes of ecclesiastical cognizance, and not for small or petty causes; and therefore in those cases the party was not bailable by the sheriff or gaoler without the king's writ: but if the party offered sufficient caution *de parendo mandatis ecclesiæ in forma juris*, then should the party have the king's writ to the bishop to accept his caution, and to cause him to be delivered. And if the bishop will not send to the sheriff to deliver him, then shall he have a writ out of the chancery to the sheriff for his delivery: Or if he be excommunicated for a temporal cause, or for a matter whereof the ecclesiastical court hath no cognizance; he shall be delivered by the king's writ, without any satisfaction. *2 Inst.* 188.

And where it is said, that the sheriff shall not bail them *by the common writ, nor without writ*; this is to be understood, that the sheriff shall not replevy them by the common writ *de homine replegiando*, nor *without writ*, that is, *ex officio*: but they may be bailed in the king's bench. *2 Inst.* 189.

S. 13. *Shall not in the same writ have a sufficient and lawful addition*] *M. 1 An. 2. and Sangway.* The defendant was excommunicated for a certain cause of justification of marriage, and taken upon a capias, and brought up by habeas corpus; and exception was taken to the writ, that therein no addition was given to the defendant: but the court held, that for any of the causes mentioned in the statute, the defendant's addition ought to be in the writ; but that in other cases, no addition is necessary. 1 *Salk.* 294.

S. 13. *If in the significavit it be not contained, &c.*] By Holt chief justice, at the common law, the cause had no need to be shewn in the writ of excommunicato capiendo; but it was sufficient to say, that the party was excommunicate for manifest contumacy: but in the bishop's certificate it ought to be shewn. And now since the statute of the 5 *Eliz.* the cause ought to be shewn in the writ. *Ld. Raym.* 619.

M. 12 W. K. and Fowler. In the king's bench. On a habeas corpus the return was, that Fowler was taken and in custody by a writ of excommunicato capiendo; and the excommunication was in the writ recited to be, for certain causes of subtraction of tithes or other ecclesiastical rights. And because this return was uncertain, the court was moved that he might be discharged. And the question was, whether this return was uncertain; and whether that uncertainty would vitiate the writ. And the court resolved, 1. That the return was uncertain; for that the *other rights* might be such matters as were out of their jurisdiction, and they ought to shew the matter was within their jurisdiction; for of that the king's courts are to be judges, and not they themselves. 2. The cause of excommunication must be set forth in the writ. At common law, the writ de excommunicato capiendo was always general, for contumacy; not containing a special cause. And the writ was returnable in chancery, and founded on a certificate of the bishop, which certificate set forth the cause before, and the party could not be discharged but by superseas in chancery, if the cause were insufficient. But now the cause must be set forth in the writ de excommunicato capiendo itself, because by the statute of the 5 *Eliz.* the writ is made returnable in this court, which would be to no purpose, if the cause were not to be set forth in the writ, and this court judge of that cause. The court held, they might discharge the party, upon the insufficiency of the return. Before the 5 *Eliz.* there were no discharges in this court
on

on excommunicato capiendo's, but where a man was excommunicated pending a prohibition: now, the case is altered; for this court may quash the writ of excommunicato capiendo, or award a superseas; because this court are judges of the cause, and have it before them, and the party cannot go into chancery for a superseas now, because the writ is returnable here. Accordingly the writ was quashed, and this special entry made on the habeas corpus, that the party was discharged because the writ de excommunicato capiendo was quashed. 1 Salk. 293.

M. 1 An. 2. and the bishop of *St. David's*. The defendant, having been arrested upon an excommunicato capiendo, was brought into court by habeas corpus. And upon the return it appeared, that he was excommunicated for non-payment of costs, in which he was condemned by commissioners delegate in a certain cause of office or correction, at the promotion of Lucy. And this by the court was held to be ill; because it did not appear, that these costs were adjudged in a cause of ecclesiastical cognizance; and it is plain, since the statute of the 5 *Eliz.* that the cause ought to appear in the writ; for otherwise how can this court make judgment of the several causes specified in that statute, in order to award several processes with penalties? And the court quashed the writ of excommunicato capiendo, and discharged the defendant. *L. Raym.* 817.

So, in the court of chancery, *M. 10 G. 2. K. and Eyre*. Two significavit were quashed, being only said to be in a cause which came by appeal concerning a matter merely spiritual. For by lord Talbot; we are not to lend our assistance, but where it appears clearly they have jurisdiction, and are not to trust them to determine what is a matter merely spiritual: in Fowler's case it was, in causes of ecclesiastical rights, and held not sufficient. *Str.* 1067.

19. In the said statute of the 5 *Eliz. c. 23.* there is a saving to all archbishops and bishops and all others having authority to certify any person excommunicated, the like authority to accept and receive the submission and satisfaction of the said person so excommunicated, in manner and form heretofore used; and him to absolve and release, and the same to signify, as heretofore it hath been accustomed, to the king's majesty in the high court of chancery; and thereupon to have such writs for the deliverance of the said person so absolved and released from the sheriff's custody

Excommunication.

or prison, as heretofore they or any of them had, or of right ought or might have had; any thing in this statute to the contrary notwithstanding. s. 10.

In which case, if due caution be offered by the party excommunicated, and admitted by the bishop; then the bishop may command the sheriff to deliver him out of prison. *Gibf.* 1063.

The language of the writs, when they speak of absolving and delivering an excommunicate, is, *facta satisfactio*, aut *præstita cautio*, prout *moris est*, de *parendo mandatis ecclesiæ*; that is, either making present satisfaction at or upon his absolution, or putting in caution that he will hereafter perform that which the bishop shall reasonably and according to law injoin him. Which caution, in the civil law, is of three sorts: 1. *Fide jussoria*; as, where a man bindeth himself with sureties to perform somewhat. 2. *Pignoratitia*, or *realis cautio*; as when a man engageth goods, or mortgageth lands, for the performance. 3. *Juratoria*; when the party which is to perform any thing, taketh a corporal oath to do it. *Gibf.* 1063. (f)

(f) For the doctrine of the civil law on the subject of putting in cautions, see *Justinian's Inst. lib. 4. tit. 11.* with the commentaries of *Finnius* and *Huber*. Of these cautions Bishop Gibson observes, that the last of them, viz. an oath *de parendo juri et fando mandatis ecclesiæ in forma juris*, is that which is often accepted by ordinaries, and as to the second, it is expressly mentioned in the ancient Register (*fs. 66 a 67.*) and hath always been acknowledged, in the temporal courts, to be good in law. But as to the first, under which is comprehended the taking of a *bond*, for performance it was declared 9 *Ja.* 1. (1 *Bulst.* 122.) to be against law; but as that was a judgment given *by the way* only, so when the same matter came under consideration again, 25 *Car.* 2. *Bp. of Exon v. Star.* (*per T. Raym.* 226. 2 *Lev.* 36.) and it was urged that by the tenor of the writ, the choice of the caution is left to the discretion of the ordinary, and that caution by obligation is as much a caution as either of the other two, and more for the ease of the party than a pledge, and the constant use and practice of the ecclesiastical courts. Upon this *Hale* doubted whether it was good or not; but *Wild* held it was good, saying such bonds had been frequent, and that they had been allowed in the court of common pleas. But the cause being moved again, the court would not proceed in it, because the excommunication and offence were taken off by the king's general pardon. *Cod.* 1063.

If

If good and sufficient caution is offered and not admitted, then a writ to the bishop is provided in the register, to command him (after having taken sufficient caution) to order the person to be delivered. *Gibf.* 1063.

And if the bishop doth not deliver him upon the said writ, then the party may have another writ to the sheriff, to command him to apply personally to the bishop, and admonish him to deliver the party after having taken sufficient caution; and if the bishop will not do the same in presence of the sheriff, then the sheriff to deliver him. *Gibf.* 1063. (g)

And the reason thereof is, for that by the excommunication the party is disabled to sue any action, or to have any remedy for any wrong done unto him so long as he shall remain excommunicate. And also the party grieved may have his action upon his case against the bishop; in like manner as he may when the bishop doth excommunicate him for a matter which belongeth not to ecclesiastical cognizance. Also the bishop in those cases may be indicted at the suit of the king. 2 *Inst.* 623.

In like manner, if one appear in the spiritual court, and is excommunicated for refusing to answer, where he is not bound by the law to answer (as, for instance, when he cannot obtain a copy of the libel); prohibition is granted, with a clause to absolve and deliver the party. *Gibf.* 1063. (h)

But although, in case the party excommunicated rests in the sentence given against him, there is no legal means for his deliverance, but submission and caution as is aforesaid; yet if he *appeal* from such sentence to a superior ecclesiastical judge, this puts the party in the same state that he was in before the sentence given; which the law orders, by reason of the present doubtfulness whether it was valid or invalid. Add to this, that by appeal, the judge *a quo* doth cease to be his judge in that cause; and if the party was imprisoned, and were to continue so, he would thereby be hindred from the effectual prosecution of his appeal, which may happen to prove just. Wherefore, upon allegation in behalf of the party against whom the writ is gone out, that he hath appealed, and upon

(g) See these writs in the Register, *fd.* 66, *et seq.* Also *F. N. B.* 62. *b.* 63. and 3 *Bl. Com.* 101, *et seq.*

(h) *Siderf.* 232. 12 *Rep.* 76.

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proof made thereof by an authentic instrument, a writ of superfedas (without any appearance of a scire facias preceding) is provided for him in the register. *Gibf.* 1063.

But the usual way (especially in cases where it is doubtful whether objections may not lie against his being delivered) is, the issuing a scire facias, to warn the bishop and the party prosecuting, to shew cause why the sheriff should not surcease from attaching the excommunicate, or why he should not deliver him, if he be in prison. And if the bishop in cases of office, and the prosecutor in cases of instance, do not appear in chancery, the party is delivered; but if they appear, and not the party, then a re-attachment goes forth to imprison him. *Gibf.* 1064. (i)

M. 1 *An.* 2. and the bishop of *St. David's*. The defendant was taken upon a writ of excommunicato capiendo, and being in custody in Newgate prayed a habeas corpus, and was brought into court thereupon; and it appeared by the return, that the writ of excommunicato capiendo was not yet returnable. And the court held, that one taken on a writ of excommunicato capiendo cannot come into this court but by habeas corpus; and if he be brought in before the writ is returnable, he shall not be allowed to plead or move to quash the writ. 1 *Salk.* 294.

Ex. cap. may be
superfedas.

But in the case of *K. and Theod. H.* 3 *G.* After the writ had been opened and entered of record, it was delivered out in order to take up the defendant; and before the return, the defendant moved and had it superfedas: for the court said, they could judge of it by the entry; and since it appeared, that the defendant could not be legally detained upon it if he was taken, it was proper to superfedas it, to prevent the man's being restrained of his liberty contrary to law; that the intent of the statute, which directs the writ to be delivered in open court, was to apprise the court of the nature of the cause; that this was now to be considered as a writ that *improvidè emanavit*; and they were not to wait till the return, till all the inconveniencies which they should have prevented by not issuing the writ had happened. *Str.* 43. (k)

If

(i) *Reg. f.* 68, 69

(k) 10 *Mod.* 350. *S. C.* The writ *de excom. cap.* in this case was in a writ *pro correctione morum* generally, and held to be ill

If a person be excommunicated by divers excommunications, for divers offences, and produceth letters of absolution from one sentence; he shall not be discharged, until he be absolved from them all. 1 *Inß.* 134.

If after a person is excommunicate, there comes a general act of pardon, which pardons all contempts, it seems that the offence is taken away, without any formal absolution. 2 *Bac. Abr.* 326.

Executor. See *Wills.*

Exemptions. See *Peculiars.*

Exorcist.

1. **EXORCIST**, is one of the five inferior orders in the church of Rome; whose office it is, to compel by abjuration evil spirits tormenting men, in the name of almighty God to come out of them. *Gibf.* 99.

2. *Can.* 72. No minister shall, without the licence of the bishop of the diocese under his hand and seal, attempt upon any pretence whatsoever either of possession or obsession, by fasting and prayer to cast out any devil or devils; under pain of the imputation of imposture or cozenage, and deposition from the ministry.

3. In the form of baptism in the liturgy of the 2 *Ed.* 6. it was ordered thus;—

Then let the priest, looking upon the children, say,
I command thee, unclean spirit, in the name of the Fa-

ther, ill on the authority of *Rex v. Gapp, Pas.* 1 *Geo.* which was in *quodam negotio pro reformatione et correctione morum.* And in *Rex v. Manning, Str.* 76. a writ *de excom. cap.* was quashed, being only for not appearing to answer *certis articulis animæ sue salutem morumq; correctionem concernentibus.* In these and similar cases, to use the expression of Mr. Justice Blackstone, the courts of Westminster-hall exercise a parental authority in correcting the excesses of inferior courts, and keeping them within their legal bounds; but on the other hand they afford them a parental assistance in repressing the insolence of contumacious delinquents, and rescuing their jurisdiction from that contempt, which for want of sufficient compulsive powers would be sure to attend it. *Vol.* 3, *p.* 103.

Faculty court.

ther, of the Son, and of the Holy Ghost, that thou come out, and depart from these infants, whom our Lord Jesus Christ hath vouchsafed to call to his holy baptism, to be made members of his body and of his holy congregation; therefore, thou cursed spirit, remember thy sentence, remember thy judgment, remember the day to be at hand, wherein thou shalt burn in fire everlasting, prepared for thee and thy angels; and presume not hereafter to exercise any tyranny towards these infants, whom Christ hath bought with his precious blood; and by this his holy baptism called to be of his flock.

Extortion. See Fees.

Faculty. See Dispensation.

Faculty court.

THE faculty court belongeth to the archbishop of Canterbury; and his officer is called master of the faculties. His power is, to grant dispensations, as to marry, to eat flesh on days prohibited, to hold two or more benefices incompatible, and such like. 4 Inst. 337.

Fairs and markets. See Church.

Fasts. See Holidays.

Feast. See Holidays.

Fees.

1. BY the 25 Ed. 3. R. 3. c. 9. Because the king's justices do take indictments of ordinaries and of their ministers, of extortions and oppressions, and impeach them without proving in certain, wherein, or whereof, or in what manner they have done extortion; the king will, that his justices shall not from henceforth impeach the ordinaries, nor their ministers, because of such indictments of general extortions or oppressions, unless they

Jay, and put in certain, in what thing, and of what, and in what manner, the said ordinaries; or their ministers have done extortions or oppressions.

In the 33 *Eliz.* a commissary, register, and apparitor, were indicted of extortion; for that they, by colour of their offices, had received 11 s 6 d for absolution: and exception was taken to the indictment, that by this statute the particular offence of every offender ought to have been especially set down; but the exception was not allowed; because they took the sum in gross, and the party grieved could not have notice by what proportion they divided it. 2 *Leon.* 268.

Another exception in the same case was, because it was not shewed what was their due fee: and this was conceived to be a good cause of exception; for if no fee be due, the same ought to appear in the indictment. And afterwards, the opinion of the court was, that they should be discharged. 2 *Leon.* 268.

2. *Can.* 135. No bishop, suffragan, chancellor, commissary, archdeacon, official, nor any other exercising ecclesiastical jurisdiction whatsoever, nor any register of any ecclesiastical courts, nor any minister belonging to any of the said officers or courts, shall hereafter for any cause incident to their several offices, take or receive any other or greater fees, than such as were certified to the most reverend father in God John late archbishop of Canterbury, in the year of our Lord 1597, and were by him ratified and approved; under pain that every such judge, officer, or minister offending herein, shall be suspended from the exercise of their several offices for the space of six months for every such offence. Always provided, that if any question shall arise concerning the certainty of the said fees, or any of them; then those fees shall be held for lawful, which the archbishop of Canterbury for the time being shall under his hand approve: except the statutes of this realm before made do in any particular case express some other fees to be due.

One of the articles or canons ratified in the year 1584 was, that no other nor greater fees should be taken for any cause, by any bishop, ordinary, archdeacon, or their ministers, than those which were used to be taken at the beginning of the queen's reign; and that a table of all such fees should be put in every consistory before the feast of St. John Baptist then next ensuing: a copy whereof, signed by the ordinary, was to be transmitted within the said time to the archbishop. *Gibf.* 1015.

Which said article was repeated in the constitutions of archbishop Whitgift, in the year 1597 aforesaid: and it is there enjoined, 1. That the table which is to be hung up in the consistory shall contain the several sums of every particular fee, which most frequently and usually, from the beginning to the eighteenth year of the queen's reign, had been wont to be taken, as well by the judge, as by all and every of the officers and ministers of the same court. 2. That an authentic copy of the said tables be delivered by every judge to their respective bishops, to be preserved in their archives. 3. That every bishop transmit an authentic copy written on parchment, to the archbishop. *Gill. 1015.*

3. *Can. 136.* The registers belonging to every ecclesiastical judge, shall place two tables, containing the several rates and sums of all the said fees; one in the usual place of consistory where the court is kept, and the other in his registry; and both of them in such sort as every man whom it concerneth may without difficulty come to the view and perusal thereof, and take a copy of them; the same tables to be set up before the feast of the nativity next ensuing. And if any register shall fail to place the said tables according to the tenor hereof, he shall be suspended from the execution of his office, until he cause the same to be accordingly done. And the said tables being once set up, if he shall at any time remove, or suffer the same to be removed, hidden, or any way hindered from sight, contrary to the true meaning of this constitution; he shall, for every such offence, be suspended from the exercise of his office for the space of six months.

The judge of every ecclesiastical court hath an undoubted right, upon proper application (by petition) from any suitor in the said court, to tax the proctor's bill. And the method usually practised is, for the judge to refer it to the register, directing the respective parties to attend him if they think fit, one to make his exceptions, and the other to justify the several articles or items of his bill; and the register to make his report to the judge, who thereupon proceeds to tax the bill. If the register has any doubt, the assistance of the other proctors may be required. The fees alledged to be given to counsel, if denied by the client, as also his demand for any unusual or extraordinary articles which do not appear from the proceedings in the cause, must be cleared up to the satisfaction of the judge, either by the proctor's oath (if he voluntarily offers it, and there be no affidavit to the contrary), or by receipts and vouchers from

from those to whom the money is alledged to be paid, or by producing letters and orders from his client.

4. Dr. Gibson says, Fees having been demanded by proctors, and (upon refusal to pay) suits commenced by them in the spiritual courts against their clients; prohibitions have been prayed on many occasions: some on pretence that the thing itself is properly cognizable in the temporal courts, for which they might bring an action upon the retainer, for work and labour done; and others upon surmise of custom. And the sum and substance of what hath usually been resolved upon that head, was delivered by Vaughan and Windham, in the case of *Horton and Wilson* (1 Mod. 167); that no court can better judge of the fees that have been due and usual in the spiritual court than themselves, and that therefore the suit for fees was most proper for that court; unless where the foundation of the demand should be custom, and it should come in question whether the custom was so or not: and in that respect they compared this case to the case of a modus for tithes; which if not denied may be recovered in the spiritual court; but if denied, prohibition goeth. It was said by Hale chief justice, in the case of *Web and Hartfell* (3 Keb. 516.), that no action upon the case was ever brought for proctor's fees, and that therefore they may be sued for in the spiritual court. And tho' a prohibition was granted in the case of *Sir Edward Lake* (3 Keb. 203.), that was not because it was a suit for fees, but because it was a suit before himself for his own fees. To which may be added, what was said in the case of *Johnson and Lee* (5 Mod. 242.), that rules are made in the temporal courts, to oblige the attornies there in matters of practice: and the like rules are made in the ecclesiastical courts, to oblige the proctors and ministers there; so that they must be allowed to be the proper judges in this matter. *Gibf.* 1015.

But in the case of *Goslin and Ellison*, H. 5 W. A prohibition was prayed and granted, in the king's bench, to stay a suit in the archdeacon of Litchfield's court, against churchwardens, for a fee for swearing them, and taking presentments; and though an attempt was made to discharge the rule, it was over-ruled: and it was insisted, that no fees could be due but by custom, or for work done; in which case, a quantum meruit lay. 1 Salk. 330.

And in the case of *Pollard and Gerard*, M. 13 W. A motion was made in the court of king's bench for a prohibition

hibition to be directed to the court of the archdeacon of Middlesex, to stay a suit there by Gerard against the plaintiff for fees, to wit, 4 s due to him as register, from Pollard, being sworn before him churchwarden; upon suggestion, that the office of register is a temporal office, and all profits and fees due to it suable at common law. And a rule was made to shew cause why a prohibition should not be granted. And on shewing cause, it was agreed, that prohibitions have been granted in this court, to stay suits in the spiritual court for fees due to the *proctors*; but in this case (it was said) the spiritual court may make a better judgment, whether the fees in demand are due and reasonable: besides that they are so small, that it would not be worth while to bring an action at common law for them; and in such case this court will not drive the party to the tedious and expensive remedy of an action. In this court, the door-keepers claim fees by custom; and fees are due to the marshal, cryer, and others, at the assizes; and in such cases, if the parties who ought to pay the fees refuse to do it, this court or the judge of assize respectively exert their authority, and commit persons refusing to pay their fees, and do not drive the party grieved to their action: and this (it was said) is the constant practice. But by Holt chief justice; I know of no such practice: I cannot commit a man for not paying the said fees; if there is right, there is remedy: *indebitatus assumpsit* will lie, if the fee is certain; if uncertain, *quantum meruit*. It was held in the 15 Cha. 2. in the exchequer, in a case reported by Hardres, that a register cannot sue for his fees in the spiritual court: therefore in this case a prohibition shall be granted; and if the parties will, the plaintiff shall declare upon it, to the end the matter may be determined more judicially. *L. Raym.* 703.

So, in *Gifford's case*, *M. 1 An.* Gifford was libelled against in the ecclesiastical court for fees: and upon motion a prohibition was granted; for no court hath a power to establish fees. The judge of a court may think them reasonable; but that is not binding. But if on a *quantum meruit* a jury think them reasonable, then they become established fees. *1 Salk.* 333.

And in the case of *Davies and Williams*, *T. 1724.* In the exchequer: Libel in the spiritual court for proctor's fees. And a prohibition was granted: for, by the court, where there is remedy at law, the spiritual court ought not to proceed;

proceed; and this case depends upon a contract and re-
tainer, which is triable at law. *Burb. 170. (1)*

Finally, Sir William Blackstone, speaking of pecuniary causes cognizable in the ecclesiastical courts, arising either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrues to the plaintiff, says, for these he is permitted to institute a suit in the spiritual court. But care must be taken, that these are real and not imaginary dues; for if they be contrary to the common law, a prohibition will issue out of the temporal courts to stop all suits concerning them. As where a fee was demanded by the minister of the parish for the baptism of a child, which was administered in another place; this, however authorized by the canon, is contrary to common right: for of common right no fee is due to the minister even for performing such branches of his duty, and it can only be supported by a special custom; but no custom can support the demand of a fee, without performing them at all. 3 *Black. 90.*

Archbishop Whitgift's table of fees, set forth in the year 1597: taken from *Ayl. Parerg. 551.*

	Judge.		Register.		Proc. tor.		Appar. tor.	
	s.	d.	s.	d.	s.	d.	s.	d.
Commission — —	10	0	6	8				
Exemplification — —	10	0	6	8				
Significavit — —	10	0	6	8				
Letter of quietus — —	10	0	6	8				
Administration where the goods exceed 40l. —	10	0	6	4				
Letters to collect the goods of the deceased — —	6	8	3	0				
Sequestration of the profits	6	8	3	4				
Tuition or guardianship —	6	8	3	4				
Licence to solemnize matri- mony without banns —	6	8	3	4				
Sentence — — —	6	0	6	0				
Transmission of process —	6	0	as taxed by the judge.					

(1) So in *Pearson and Campion, Doug. Rep. 629.* a prohibition was granted to a suit in the spiritual court by an appraitor for his fees.

	Judge.	Register.	Proctor.	Appt.
	s. d.	s. d.	s. d.	s.
Licence to sue out of the jurisdiction — —	5 0	5 0		
Letters testimonial — —	5 0	6 8		
Examination of process — —	3 4			
Interlocutory decree — —	3 4	1 8		
Examination of any account	3 4			
Acceptance of a resignation	3 4	2 6		
Licence to a preacher, curate or schoolmaster — —	2 0	1 4		
Licence to solemnize matrimony in the time of prohibition of banns to be published — —	2 0	1 4		
For exhibiting of any proxy	2 0	1 4		
Letters of interdict — —	2 0	1 4		
Commission of absolution — —	2 0	1 4		
Inhibition in a cause of matrimony — —	1 8	1 8		
Respite of an inventory — —	1 0			
Letters of intimation or proclamation — —	1 0	1 0		
Caveat for institution or matrimony — —	1 0	1 8		
Decree — —	0 10	0 10		
Production of the party principal — —	0 9	0 9		
Production of the first witness — —	0 9	0 9		
— — of every other witness — —	0 4 $\frac{1}{2}$	0 4 $\frac{1}{2}$		
Purgation — —	0 9	0 9		
For the first compurgator	0 9	0 9		
For every of the rest — —	0 4 $\frac{1}{2}$	0 4 $\frac{1}{2}$		
For interrogatories administered — —	0 9	0 9	3 4	
Suspension — —	0 8	0 8		
Absolution thereof — —	0 9	0 9		
Excommunication — —	0 8	0 8		
Absolution thereof — —	0 9	0 9		
Certificate of absolution — —	0 8	0 8		
Caveat for wills and administrations — —	0 6	0 6		
Citation — —	0 5	0 5		

Dismiss

	Judge.	Register.	Proc- tor.	Appar- tor.
	s. d.	s. d.	s. d.	s. d.
Dismissal of any cause of incontinence and instance after contestation of suit	0 5	0 5		
Admission of any exhibit	0 4	0 4		
Wills and administrations according to acts of parliament 21 H. 8. c. 5.				
Proctor's fee on proving a will — — —			1 0	
To the apparitor for every testament or administration above 5l — —				0 6
Institution with a mandate		6 8		
Writing any account —		6 8		
Letters of deacons or priests orders — —		3 4		
Licence of non-residence		1 4		
Bond — — —		1 0		
For every search in the registry — — —		1 0		
Schedule of excommunication — — —		0 6	0 6	
For any act — — —		0 4		
At the visitation: For exhibiting deacon's orders		0 4		
— priest's orders —		0 4		
— institution with the mandate — —		0 4		
— dispensation —		1 0		
— exhibiting any proxy at the time of visitation		2 0		
— for exhibiting any bill of detection at the same time — —		0 4		0 4
Copy of any matter, by the register: according to quantity — —				
To the proctor for counsel			2 0	
For every court day —			1 0	
Schedule of costs —			1 0	
Libel — — —			5 0	
Drawing sentence —			3 4	
Drawing any account —			3 4	

Drawing

	Judge.		Register.		Proc- tor.		Appra- tor.	
	s.	d.	s.	d.	s.	d.	s.	d.
Drawing any personal an- swer — —					2	6		
For any other procuratorial matter — —					3	4		
Execution of any process per mile — — —							0	2
Dismissal of a cause of in- continency — —							0	3

To the judge's man for wax to seal every thing, 4d.

Note, There were no stamps in those days.

In the several dioceses there are tables of fees, different (as it seemeth) in the several charges, in proportion to the difference of times wherein they have been established. Those which have in them the *purgation fees*, are probably ancienter than the statute of the 13 C. 2. by which statute purgation was abolished. And the older they are, the nearer they approach to this standard of archbishop Whitgift. But considering the continual and large decrease in the value of money, it is impossible to fix any certain measure which will continue reasonable for any considerable time; but new standards ought to be fixed at certain periods. Money in the latter end of queen Elizabeth's reign, was more than double, or treble the value of what it is at present.

Here follows a table of fees allowed to be taken by the practitioners in doctors commons, as settled by a jury, Nov. 19, 1734. Taken from *Fleyer's* proctor's practice, p. 172. [With the stamps to 35 Geo. 3. inclusive.]

		l. s. d.		
Register's fees,	To the register for the copy of answers (if one sheet) — — —	0	4	6
	For every other sheet — — —	0	2	0
	Stamp on the whole — — —	0	2	6
	For the copy of a sentence, or interlocutory decree (and stamp 2 s) — — —	0	8	8
	For the copy of any common record — — —	0	4	4
	Attending with records at another court, the first day — — —	1	0	0
	For every other attendance — — —	0	10	0
		Poundage		

	l.	s.	d.	
Poundage for money brought into court, <i>per</i> pound	0	0	2	
For a bond in a cause of legacy	0	13	4	
Stamp	0	7	0	
For two receipts registering (stamps according to sum)	0	3	4	
Register's attendances	0	3	6	
For the service of a process within the bills of mortality	0	2	6	Apparitors.
Serving a compulsory, upon the first witness	0	2	6	
upon every other	0	1	0	
Stamp on compulsory, for 4 witnesses	0	2	6	
a decree for answers, upon a proctor	0	1	0	
Stamp	0	2	6	
For every sentence or interlocutory	0	2	0	
Stamp	0	2	0	
Reporting securities	0	2	6	
For every witness sworn in court	0	0	6	
For citing a peer <i>more procerum</i>	0	5	0	
For the copy of a will (fifteen lines and six words in a sheet) formerly 10 d, now	0	0	11	To the register.
Stamp on every such sheet	0	0	3	
For the copy of an administration-bond	0	5	0	
Stamp	0	2	0	
To the clerk looking it up	0	1	0	
The whole <i>fees</i> for a faculty to remove a corpse	3	10	10	Proctor and re- gister.
for building a vault	4	6	8	
For a sequestration under seal, and stamps	1	1	8	
Relaxing the same	0	13	4	
To the officer (if in London 2 s 6 d) in the country	0	5	0	
Drawing an institution, mandate, certificate, and letters testimonial	4	8	0	To the register.
If caution is given, then extraordinary for it	0	6	8	
<i>Fees</i> for institution to any prebend of Canter- bury	4	8	0	
Stamp on institution	0	15	0	
Every collation is	2	18	8	
Stamp on collation	6	0	0	
Every lecturer and curate's licence	1	19	4	
Parish clerk's licence	1	15	8	
Sexton's licence	1	12	8	Proctor and re- gister.
Stamp on licences (except for a stipen- diary curate)	0	15	0	
				Whole

	l.	s.	d.
Whole fees for an administration (under 20l)			
of a sailor in the king's service	0	7	0
Probate of a will <i>ditto</i>	0	7	6
For an administration under 5l in other cases	0	7	0
For an administration under 20l in other cases (including bond stamp 7s and warrant 2s)	1	11	6
<i>Ditto</i> under 40l (including the above stamps and 10s on administration)	2	5	0
For an administration above 40l and under 100l (including the same stamps as under 40l)	2	14	6
A commission for an administration, instruc- tions and return	1	10	0
Stamp on commission	0	5	0
on bond	0	7	0
on warrant	0	1	0
For a probate (under 20l) the will short	1	4	10
<i>Ditto</i> above 20l (including stamp as on admi- nistration)	1	14	0
A commission for a will (including stamp 5s and warrant 1s)	1	17	4
Exemplification of a will	0	10	4
Exemplifying	0	1	0
Ingrossing (according to length.)			
Seal	0	7	2
Stamp	1	0	0
In a will without witness, where the hand- writing is to be proved by two witnesses, the affidavit (and stamp 2s) is	0	8	8
Oaths	0	5	4
Whole fees of a guardianship (if you have a copy attested by the register) are	1	1	0
Stamps	0	4	0
If not, you deduct 7s 8d; remains	0	13	4
Stamp	0	2	0
Expence of having an original will attended with at assizes			
Searching and looking up the original	0	3	4
Record keeper's fee	0	2	0
Affidavit (and stamps 2s)	0	8	8
Oath and record keeper's attendance	0	4	6
Copy of the will to lie in the room of the original, and stamps, (according to the length)			
Collating by notaries	0	5	0

First fruits and tenths.

273

	l.	s.	d.
Receipts	0	1	8
Record keeper's fee attending at assizes per day	1	1	0
Attending on delivering out the original	0	6	8
Register's fees on delivery	1	0	0
For a proxy to appear for plaintiff or defendant (and stamp 6 s.)	0	12	4
Drawing a declaration instead of an inventory	0	6	8
Stamp	0	2	6
Oath and attendance	0	4	4
A marriage licence (stamp on licence 5 s. bond 7 s. warrant 1 s.)	1	14	6
For a sequestration or renunciation of administration	0	6	8
Stamp	0	2	0
For the first term fee in causes	0	5	0
For every other term fee	0	3	4
Every judicial attendance	0	3	4
Extrajudicial attendance	0	6	8
For every act sped in court, in term	0	1	8
Out of court	0	2	4
Stamp on all notarial attestations	0	2	0

Fence of the churchyard, See Church.

Fighting in the church or churchyard. See Church.

First fruits and tenths.

- I. First fruits and tenths given to the pope.
- II. First fruits and tenths annexed to the crown.
- III. Concerning the manner of payment of first fruits and tenths.
- IV. First fruits and tenths appropriated to the augmentation of small livings.

I. First fruits and tenths given to the pope.

1. *ANNATES*, *primitiæ*, or first fruits, was the value of every spiritual living by the year, which the pope, claiming the disposition of all ecclesiastical livings within christendom, reserved out of every living.

12 Co. 45.

VOL. II.

* T

What

First fruits and tenths.

What pope first imposed first fruits historians do not agree. 4 *Inst.* 120. (m)

In the 34 *Ed.* 1. at a parliament held at Carlisle, great complaint was made of intolerable oppressions of churches and monasteries by William Testa (called Mala Testa) and the legate of the pope, and principally concerning first fruits; at which parliament the king by the assent of his barons denied the payment of first fruits of spiritual promotions within England, which were founded by his progenitors and the nobles and others of the realm, for the service of God, alms, and hospitality. And to this effect he writ to the pope; and thereupon the pope relinquished his demand of first fruits of abbays: in which parliament the first fruits for two years were granted to the king, 12 *Co.* 45.

In the 50 *Ed.* 3. the commons complain amongst other grievances from the court of Rome, that the pope's col-

(m) Mr. Hume in his history of Edward 1. says, "the levying of first fruits was also a new device, begun in this reign, by which his holiness thrust his fingers very frequently into the purses of the faithful: and the king seems to have unwarily given way to it." Mr. justice Blackstone, discoursing of first-fruits and tenths, *vol.* 1. p. 283. says, "they were originally a part of the papal usurpations over the clergy of these kingdoms, first introduced by Pandulph, the pope's legate, during the reigns of king John and Henry the third, in the see of Norwich, and afterwards attempted to be made universal by the popes Clement the fifth, and John the twenty-second, about the beginning of the 14th century. The first fruits, *primitiæ*, or *annates*, were the first year's whole profits of the spiritual preferment, according to a rate or *valor* made under the direction of pope Innocent the fourth, by Walter bishop of Norwich, in 38 *H.* 3. and afterwards advanced in value by commission from pope Nicholas the third, A.D. 1292. 20 *Ed.* 1. Which valuation of pope Nicholas is still preserved in the exchequer. (3 *Inst.* 154.) The tenths, or *decimæ*, were the tenth part of the annual profit of each living by the same valuation." When the first fruits and tenths were transferred to the king at the head of the church by 26 *Hen.* 8. c. 3. confirmed by 1 *Eliz.* c. 4. commissioners were appointed in each diocese to make a new *valor beneficiorum*, by which the clergy are at present rated. This is commonly called the *king's books*, and a transcript of it is given in Eikon's Thesaurus, and Bacon's Liber Regis. 1 *Bl. Com.* 285. with the note of Mr. Christian. The reason alledged by the canonists for the exaction of these first fruits by the pope, was *pro conservando decenti statu suo, ut qui omnium curam habet de communi alatur.* *God. Rep. Can.* 337. See the case of first fruits and tenths, 12 *Rep.* 45.

lector that year (a thing never before done) had taken the first fruits of every benefice whereof he had made provision or collation; whereas he was used to take first fruits only of benefices vacant in the court of Rome.

Dugge, p. 2. c. 15.

In truth this tribute or revenue of first fruits was gradually by little and little imposed by the bishop of Rome, on such vacant benefices as himself conferred and bestowed; and this was often complained of as a very great grievance; so that in the council at Vienna, Clement the fifth who was made pope in the year 1305, forbade the receiving thereof, and ordered the same to be laid aside, and that the twentieth part of the sacerdotal revenues should instead thereof be annually paid to the bishop of Rome: but this not taking effect, the pope so retained the said annates to his exchequer, as that it long remained one of the most considerable parts of his revenue. *God. Rep.* 337.

2. *Tenths, decimæ*, are the tenth part of the yearly value of all ecclesiastical livings. . 4 *Inst.* 120, 121.

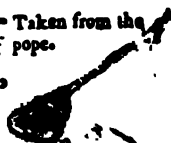
These tenths the pope (after the example of the high priest among the Jews, who had of the Levites a tenth part of the tithes) claimed as due to himself by divine right. And this portion or tribute was by ordinance yielded to the pope in the 20 *Ed.* 1. and a valuation then made of the ecclesiastical livings within this realm, to the end the pope might know and be answered of that yearly revenue; so as the ecclesiastical livings chargeable with the tenth (which was called spiritual) to the pope, were not chargeable with the temporal tenths or fifteenths granted to the king in parliament, lest they should be doubly charged: but their possessions acquired after that taxation were liable to the temporal tenths or fifteenths, because they were not charged to the other. So as the tenths of ecclesiastical livings were not yielded to the pope *de jure* after the example of the high priest among the Jews, for then he should have had the tenths of all ecclesiastical livings whensoever they were acquired, but he contented himself with what he had got, and never claimed more: and that he might the better keep and enjoy that which he had got, the popes did often after grant the same for certain terms to divers of the kings of England, as by our histories doth appear. 2 *Inst.* 627, 628.

II. First fruits and tenths annexed to the crown.

1. By the 25 *H.* 8. c. 20. No person shall be presented and nominated or commended to the bishop of pope.

T 2

Rome,



First fruits and tenths.

Rome, for the office of an archbishop or bishop, nor send nor procure there for any bulls breeves palls or other things requisite for an archbishop or bishop, nor shall pay any sums of money for annates, first fruits, nor otherwise for expedition of any such bulls breeves or palls; but the same shall utterly cease, and no longer be used within this realm. *f. 3.*

Given to the
king.

2. And by the 26 *H. 8. c. 3.* The king his heirs and successors, kings of this realm, shall have from time to time to endure for ever, of every person who shall be nominated elected presented presented collated or by any other means appointed to have any archbishoprick, bishoprick, abbacy, monastery, priory, college, hospital, archdeaconry, deanry, provostship prebend, parsonage, vicarage, chauntry, free chapel, or other dignity benefice or promotion spiritual, of what name nature or quality soever they be, or to whose foundation patronage or gift soever they belong, the first fruits revenues and profits thereof for one year. *f. 2.*

And he shall also yearly have united to his imperial crown for ever, one yearly rent or pension amounting to the value of the tenth part of all the revenues, rents, farms, tythes, offerings, emoluments, and of all other profits as well called spiritual as temporal, belonging to any archbishoprick, bishoprick, abbacy, monastery, priory, archdeaconry, deanry, hospital, college, house collegiate, prebend, cathedral church, conventual church, parsonage, vicarage, chauntry, free chapel, or other, benefice or promotion spiritual, of what name nature or quality soever they be, within any diocese of this realm or in Wales. *f. 9.*

III. Concerning the manner of payment of the first fruits and tenths.

Compounding
for and payment
of first fruits.

1. Every person, before any actual or real possession or meddling with the profits of his benefice, shall pay or compound for the first fruits to the king's use, at reasonable days, and upon good sureties. 26 *H. 8. c. 3. f. 2.*

And the chancellor of England and master of the rolls, jointly and severally, or such other persons as the king shall depute by commission under the great seal, shall have power to examine and search for the true value of such first fruits, and to compound for the same, and to limit reasonable days of payment thereof upon good surety by writing obligatory: and if composition be made for the same before the lord chancellor or master of the rolls, then the writings obligatory or money taken for the same shall be delivered to the clerk of the hanaper for the king's use; and
if

If composition be made before any other persons so deputed by the king as aforesaid, then the same shall be delivered to the treasurer of the chamber or elsewhere as the king by commission under the great seal shall appoint. *f. 3.*

Whose acquittance respectively shall be a sufficient discharge. *f. 4.*

And such writings obligatory shall be of the same effect as writings obligatory made by any lay person by authority of the statute of the staple; and upon certificate thereof into the chancery, like process and execution shall be thereupon had, as upon certificate of writings obligatory of the statute of the staple. *f. 4.*

And the sum of 8d (over and above the stamps) shall be paid for such writing obligatory, and no more; and 4d for an acquittance. *f. 4.*

And one bond only shall be given for the several payments. *2 & 3 An. c. 11. f. 6.*

And persons so deputed as aforesaid shall every six months deliver to the treasurer of the chamber, or elsewhere to such other commissioners as the king shall appoint, as well all such money as all such specialties and bonds, by indenture to be made between them: and if any such person so deputed, his heirs executors or administrators, shall conceal or embezzle any of the said specialties or bonds, and do not deliver them according to the tenor of this act; he shall forfeit his office, and make fine and ransom at the king's will. *26 H. 8. c. 3. f. 4.*

2. And if any person shall enter into the possession or meddle with the profits of his spiritual promotion before he hath paid or compounded as aforesaid, and be convicted thereof by presentment verdict confession or witness, before the said lord chancellor or such other as shall have authority by commission to compound for the same; he shall be accepted and taken an intruder upon the king's possession, and shall forfeit double value. *26 H. 8. c. 3. f. 5.*

3. And in order to ascertain the valuation, it was enacted by the said statute of the *26 H. 8. c. 3.* that the chancellor of England should have power to direct into every diocese commissions in the king's name under his great seal, as well to the archbishop or bishop as to such other persons as the king should appoint, commanding them to examine and enquire of the true yearly values of all the manors lands tenements hereditaments rents tythes offerings emoluments and all other profits as well spiritual as temporal, appertaining to any such benefice or promotion; with a clause to be contained in every such commission, that they should deduct and allow these deductions following and none other, that

First fruits and tenths.

that is to say, the rents resolute to the chief lords, and all other annual and perpetual rents and charges which any spiritual person is bound yearly to pay to any person, or to give yearly in alms by reason of any foundation or ordinance, and all fees for stewards receivers bailiffs and auditors, and synods and proxies; and with another clause to be contained in their commission, that they should certify under their seals, at such days as should be limited by the said commissions, as well the whole and entire value as the deductions aforesaid. *f. 10, 11.*

And furthermore, all fees which any archbishop bishop or other prelate of the church is bound yearly to pay to any chancellor, master of the rolls, justices, sheriffs, or other officers, or ministers of record, for temporal justice to be done or ministered within their diocese or jurisdictions, were to be deducted by the commissioners in their valuation. *f. 30.*

In what diocese
to be rated.

4. And every archbishoprick bishoprick and other benefice and promotion above specified, shall be severally and distinctly rated in the proper diocese where they be, where-soever their possessions or profits shall happen to lie, 26 *H. 8. c. 3. f. 12.*

Year when to
commence.

5. The year in which the first fruits shall be paid, shall begin and be accounted immediately after the avoidance; and the profits belonging to any archdeaconry, deanry, prebend, parsonage, vicarage, or other spiritual promotion, benefice, dignity, or office during the vacation (chaunteries only excepted), shall go to the successor towards the payment thereof. 28 *H. 8. c. 11. f. 3.*

Incumbent dy-
ing.

6. By the 26 *H. 8. c. 3.* A person presented or collated to a parsonage or vicarage, not exceeding eight marks a year (that is, according to the valuation then to be made), was not to pay first fruits except he lived three years after his admission; and in the composition there was to be a clause, that if the incumbent died within three years, the obligation should be void. *f. 27.*

And by the 1 *El. c. 4.* If an incumbent live to the end of half a year next after the avoidance, so as he hath received or without fraud might lawfully have received the rents and profits of that half year, and before the end of the next half year shall die or be lawfully evicted removed or put out by judgment at common law without fraud; he his heirs executors administrators and sureties shall be charged but only with a fourth part of the first fruits, any bond or other matter to the contrary notwithstanding. And if he live for one whole year next after such avoidance, and before the end of half a year then next following shall die

die or be removed as aforesaid; he shall be charged but with half of the first fruits. And if he live to the end of one whole year and an half, and before the end of six months then next following shall so die or be removed; he shall be charged but only with three parts of the first fruits. And if he shall live to the end of two whole years, and not be lawfully evicted removed or put out as aforesaid; he shall pay the whole. *f. 30, 31, 32, 33.*

7. Every archbishop and bishop shall have four years allowed him, when he shall compound for the same, for the payment of his first fruits, which shall commence from the time of restitution of his temporalities; and in every year he shall pay one fourth part; and if he die or be removed before the four years be expired, he shall be discharged of so much as did not become due or payable at or before the time of his death or removal, in like manner as the heirs executors and administrators of rectors and vicars shall be discharged. *6 An. c. 17. f. 5.*

Within what time archbishops and bishops shall pay.

8. Deans, archdeacons, prebendaries, and other dignitaries, shall compound for their first fruits in like manner as rectors and vicars: and in case of death or removal within the time usually allowed to rectors and vicars for payment of their first fruits, they shall be in the like condition, and have the same benefit as is allowed to rectors and vicars. *6 An. c. 27. f. 6.*

Deans, archdeacons, prebendaries, how to pay.

9. And whereas by the 26 H. 8. c. 3. there was no provision for deduction of the tenths of that same year for which the first fruits were due to be paid, whereby there became a double charge; therefore by the 27 H. 8. c. 8. it is enacted as follows: viz. for reformation thereof, the king's highness, for the entire and hearty love that his grace beareth to the prelates and other incumbents chargeable to the payment of the tenth and first fruits, of his excellent goodness is pleased and contented that it be enacted; that at the composition, allowance and deduction shall be made of the tenth part out of the first fruits, which tenth shall be paid to the king for that first year. *f. 1, 2, 3.*

Tenths to be deducted out of the first fruits.

10. And all grants made to the universities or any college or hall therein, and to the college of Eaton and Winchester, by any kings of this realm or by act of parliament, for the discharge of first fruits and tenths, shall remain in force. *1 El. c. 4. f. 34.*

Grants of exemption from first fruits and tenths to continue.

11. By the 1 El. c. 4. Vicarages not exceeding the yearly value of 10 l. after the rate and value upon the records and books of the rates and values for the first fruits and tenths remaining in the exchequer (according to the valuation made in the 26 H. 8.); and parsonages not

What livings are exempted from first fruits according to the valuation in the king's books.

First fruits and tenths.

exceeding the like yearly value of ten marks ;---shall be discharged of first fruits. *f.* 29.

And the reason why vicarages not exceeding 10 l should be freed of this charge, and parsonages of ten marks should pay, was because the vicarages in times of popery, and when the valuation was taken, had a great income by voluntary offerings, which falling to little or nothing upon the dissolution of monasteries, this favour was afforded them in their first fruits. *Degge*, p. 2. c. 15.

What livings are
exempted from
first fruits and
tenths, accord-
ing to their clear
yearly value.

12. And by the 5 *An. c.* 24. All ecclesiastical benefices with cure of souls, not exceeding the clear yearly value of 50 l by the improved valuation of the same, shall be discharged for ever from the first fruits and tenths. *f.* 1.

But this shall not discharge any benefices with cure of souls, the tenths whereof were granted away by any of her majesty's predecessors in perpetuity. *f.* 3. That is to say, it shall not discharge them of such *tenths*, but if such livings do not exceed the said clear yearly value of 50 l by the said improved valuation, they shall be discharged for ever from *first fruits*. 6 *An. c.* 27. *f.* 1.

Also this shall not diminish any annual sum stipend pension or annuity heretofore granted to any person, body politick or corporate, and charged upon the said revenues of first fruits and tenths or any part thereof; but in case it shall so happen, that by discharging such small livings, the first fruits and tenths which shall hereafter be collected in any diocese or dioceses shall not be sufficient to pay such annual sums as they now stand charged with, then the whole revenues of the first fruits and tenths throughout the kingdom shall be liable to make good such deficiency, during the continuance of such grants. 5 *An. c.* 24. *f.* 6.

And for ascertaining the said clear yearly value, the bishops of every diocese or guardians of the spiritualities (*sede vacante*), and the ordinaries of peculiars and places of exempt jurisdiction, were required by the said act of 5 *An. c.* 24. as well by the oaths of witnesses, as by other lawful means, to inform themselves of the clear improved yearly value of every benefice with cure of souls within their respective jurisdictions, the clear improved yearly value whereof did not then exceed 50 l and were to certify the same under hand and seal into the exchequer; which certificate being made and filed in the said court, was to ascertain the clear yearly value of such benefices to be discharged. *f.* 2.

St. George's
- in Wind-
-sor

13. Also the dean and canons of the free chapel of St. George within the castle of Windsor, and all the possessions

feffions thereof, shall be discharged of tenths and first fruits. from first fruits and tenths.
1 El. c. 4. f. 35.

14. Also, nothing herein shall charge any hospital Hospitals and schools exempted from first fruits and tenths. or the possessions thereof employed for the relief of poor people, or any school, or the possessions or revenues thereof, with the payment of tenths or first fruits. *1 El. c. 4. f. 40.*

15. By the 26 H. 8. c. 17. Farmers and lessees of any manors, lordships, lands, parsonages, vicarages, portions of tithes, or other profits or commodities belonging to any archbishop, bishop, or other prelate or spiritual person, or spiritual body corporate or politick, shall be discharged of first fruits or tenths; but the lessors and owners shall pay the same. Lessor to pay first fruits and tenths and not the lessee.

16. There shall be one collector or receiver of the perpetual yearly tenths, who shall be nominated and appointed by the king, by letters patents under the great seal. Collector of the tenths.
3 G. c. 10. f. 2.

And immediately after such nomination and appointment, and before he takes upon him the execution of his office, he shall take his corporal oath for the due and faithful execution of his said office, before seven or more of the governors of the bounty of queen Anne for the augmentation of small livings (as is hereafter mentioned) in a general court. *Id.*

And he shall likewise give security to the said corporation, or to such person or persons as they in their general court shall appoint, for his true and just accounting for, and payment of all and every sum and sums of money which he shall receive by virtue of his said office, and for the due and faithful execution and discharge of his said office, as the governors, at a general court at any time before his taking upon him the execution of his office, shall order and direct. *Id.*

17. And he shall keep his office in some convenient place within London or Westminster; and shall give attendance for receipt of the tenths, at such times as the said governors in their court shall direct, between Dec. 25, and Ap. 30, yearly: of which times and place, due notice shall be given by the governors in the gazette yearly one week at least before Dec. 25; whereof every person concerned shall be obliged to take notice, without any further notice by way of summons demand or otherwise. *3 G. c. 10. f. 2.* Where he shall keep his office, and when to attend there.

18. By the 26 H. 8. c. 3. The said tenths are to become due yearly at the feast of the nativity of our Lord God. *f. 9.* Times of payment of the tenths.

And

First fruits and tenths.

And by the 3 G. c. 10. If any person charged with the payment of tenths shall not pay or duly tender the same yearly before the last day of April succeeding the feast of the nativity whereon the same shall become due; then upon certificate hereof made by the collector or receiver, on or before the first day of June following, he shall be allowed upon his account all such sums as any persons against whom such certificate shall be made should or ought to have paid. And in every such case, the treasurer chancellor and barons of the exchequer shall issue upon every such certificate such process as to them shall seem proper and reasonable, against every such person against whom such certificate shall be made his executor or administrators, whereby the same may be truly levied and paid to the said collector or receiver. And every sum so levied and paid the collector or receiver shall bring to account, and charge himself therewith in his next account. *f. 3.*

Forfeiture on
non-payment of
tenths.

19. By the 26 H. 8. c. 3. and 2 & 3 Ed. 6. c. 20. persons making default in payment were to be deprived of their benefice; and the reason of this severe penalty was, because upon the reformation many clergymen scrupled and denied to pay these tenths to the king, being (as they supposed) a duty properly due to the pope. *Dig. c. p. 2. c. 15.*

But now by the 3 G. c. 10. persons making default of payment shall forfeit double value of the tenths. *f. 2.*

Tenths a charge
upon executors,
administrators,
and successors.

20. By the 26 H. 8. c. 3. the bishops were charged to collect the tenths, and upon their certificate into the exchequer on non-payment by any incumbent, process was to be issued out of the said court against such incumbent, his executors and administrators; or for insufficiency of them, against the successors of such incumbent: whereby the king might be truly answered and paid. *f. 18.*

And by the 27 H. 8. c. 8. in cases whereby the successor shall be chargeable to the payment of tenths unpaid in the time or life of his predecessor, he may distrain such goods of his predecessor as shall be upon the premises, and retain the same till the predecessor if he be alive, and if he be dead till his executors or administrators shall pay the same; and if the same shall not be paid in twelve days, then he may cause the goods to be appraised by two or three indifferent persons to be sworn for the same; and according to the same appraising may sell so much thereof as shall pay the same and also the reasonable costs that shall be spent by the occasion of distraining and appraising the same; and if no such distress can be found, then such predecessor if he be alive and if he be dead his executors or administrators may be compelled to the payment thereof

by

by bill in chancery, or by action or plaint of debt at common law. *f. 4.*

But by the 3 *G. c. 10.* the bishops are discharged from the said collection; nevertheless all former statutes for the imposing charging assessing and levying and the true answering and payment of the first fruits and tenths, not altered by the said statute of the 3 *G.* shall continue in force. *f. 4.*

21. And by the 7 *Ed. 6. c. 4.* If any promotion spiritual should chance to be or remain in such sort void, that no incumbent could be conveniently provided, the bishops were to certify the same specially: in which case it is enacted, that the king may levy and take all the glebe lands tithes issues or profits of such benefice, until he be paid the whole arrearsages of the tenths. *f. 4.*

Case of tenths where there is no incumbent.

22. In cathedral churches and colleges, every distinct head and member shall pay according to his own respective salary, and not for any others. 26 *H. 8. c. 3. f. 25, 26.*

Members of cathedrals and colleges to pay separate.

23. The collector shall give acquittances under his hand to the persons paying the same, which shall be a sufficient discharge; for every of which acquittances shall be paid the sum of 6d and no more. 3 *G. c. 10. f. 2.*

Collector to give acquittances.

24. And he shall pay the same yearly into the exchequer, before or on the last day of May. 7 *Ed. 6. c. 4. 3 G. c. 10. f. 2.*

To pay the tenths into the exchequer.

25. And such collector and receiver, his lands and tenements, shall stand charged for the true payment of such sums as he shall receive. 34 & 35 *H. 8. c. 2. 13 El. c. 4. 14 El. c. 7. 27 El. c. 3. 3 G. c. 10. f. 2.*

His estate chargeable.

26. And no officer of the exchequer shall take of any such collector or receiver any reward for making his account or quietus est in the exchequer; on pain of forfeiting his office, and making fine at the king's will. 26 *H. 8. c. 3. f. 20. 3 G. c. 10. f. 2.*

Passing his accounts.

IV. First fruits and tenths appropriated to the augmentation of small livings.

1. By the 2 & 3 *An. c. 11.* It shall be lawful for the queen, by her letters patents under the great seal, to incorporate such persons as she shall therein nominate or appoint, to be one body politick and corporate, to have a common seal and perpetual succession, and also at her majesty's will and pleasure, by the same or any other letters patents, to grant limit or settle to or upon the said corporation and their successors for ever, all the revenue of first fruits and yearly perpetual tenths of all dignities offices benefices and promotions spiritual, to be applied and disposed

Power to establish a corporation, and settle thereon the first fruits and tenths.

posed of for the augmentation of the maintenance of such parsons vicars curates and ministers officiating in any church or chapel where the liturgy and rites of the church of England as now by law established shall be used and observed; with such lawful powers authorities directions limitations and appointments, and under such rules and restrictions, and in such manner and form as shall be therein expressed. *f. 1.*

But this shall not effect any grant exchange alienation or incumbrance heretofore made of or upon the said revenues of first fruits and tenths: but the same, during the continuance of such grant exchange alienation or incumbrance, shall remain in such force as if this act had not been made. *f. 3.*

Power to settle
benefactions on
the said corporation.

2. And by the said statute of the 2 & 3 *An. c. 11.* Every person having in his own right any estate or interest in possession reversion or contingency in any lands, or property in any goods, shall have power by deed inrolled in such manner and within such time as is directed by the 27 *H. 8. c. 16.* for inrollment of bargains and sales; or by his last will or testament in writing, to give and grant to and vest in the said corporation and their successors all such his estate interest or property, or any part thereof, towards the augmentation of the maintenance of such ministers as aforesaid officiating in such church or chapel where the liturgy and rights of the said church shall be so used or observed as aforesaid, and having no settled competent provision belonging to the same; and to be for that purpose applied, according to the direction of the said benefactor by such deed or will; and in default of such direction, in such manner as by her majesty's letters patents shall be appointed as aforesaid. And such corporation and their successors shall have full capacity and ability to purchase receive take hold and enjoy for the purposes aforesaid, as well from such persons as shall be so charitably disposed to give the same, as from all other persons as shall be willing to sell or aliene to the said corporation any manors lands tenements goods or chattels, without any licence or writ of *ad quod damnum*; the statute of mortmain, or any other statute or law notwithstanding. — But this not to enable any person within age, or of non-sane memory, or woman covert (without her husband), to make any such alienation. *f. 4, 5.*

But by the 9 *G. 2. c. 36* From and after June 24, 1736, no manors lands tenements rents advowsons or other hereditaments corporeal or incorporeal, nor any sum of money goods chattels stocks in the public funds securities

for money or any other personal estate, to be laid out or disposed of in the purchase of any lands tenements or hereditaments, shall be given granted aliened limited released transferred assigned or appointed or any ways conveyed or settled to or upon any person body politick or corporate or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person, in trust or for the benefit of any charitable uses; unless such gift conveyance appointment or settlement of such lands tenements or hereditaments sums of money or personal estate (other than stocks in the publick funds) be and be made by deed indented sealed and delivered in the presence of two or more credible witnesses, twelve kalendar months at least before the death of such donor or grantor, and be inrolled in the chancery within six kalendar months next after the execution thereof; and unless such stocks be transferred in the publick books usually kept for the transfer of stocks, six kalendar months at least before the death of such donor or grantor; and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation reservation trust condition limitation clause or agreement whatsoever, for the benefit of the donor or grantor or of any person claiming under him. *§. 1.*

3. In pursuance whereof, the queen by letters patents, Letters patents of incorporation. bearing date Nov. 3. in the third year of her reign, incorporated the archbishops, bishops, deans, speaker of the house of commons, master of the rolls, privy councillors, lieutenants and *custodes rotulorum* of the counties, the judges, the queen's serjeants at law, attorney and solicitor general, advocate general, chancellors and vicechancellors of the two universities, mayor and aldermen of London, and mayors of the respective cities, for the time being, according to the purport of the said statute (unto whom, by a supplemental charter bearing date Mar. 5, in the 12th year of her majesty's reign, were added, the officers of the board of green cloth, the queen's counsel learned in the law, and the four clerks of the privy council), to be a body corporate, by the name of *the governors of the bounty of queen Anne, for the augmentation of the maintenance of the poor clergy*: and thereby granted to them the said revenue of the first fruits and tenths for the purposes aforesaid, under the rules and directions to be established pursuant to the said letters patent, together with these following directions; that is to say, That they shall keep four general courts at least in every year, at some convenient place within London and Westminster (notice being

First fruits and tenths.

being in that behalf first given in the gazette, or otherwise, 14 days before); the said courts to be in the months of March, June, September, and December: that the said governors or so many of them as shall assemble, not less than seven in number at any one meeting (whereof, by the aforesaid supplemental charter, a privy councillor, bishop, judge, or one of the queen's council to be one), shall be a general court, and dispatch business by majority of votes: with power to appoint committees, for the easier dispatch of business.

And to draw up rules and orders for the better rule and government of the said corporation and members thereof; and receiving, accounting for and managing the said revenues; and for disposing of the same, and of such other gifts and benevolences as shall be given to them for the purposes aforesaid: which being approved altered or amended by the crown, and so signified under the great seal, to be the rules whereby the governors shall manage the said revenue, and such other gifts and benevolences whereof the donors shall not particularly direct the application.

And that they shall inform themselves of the true yearly value of the maintenance of every such parson vicar curate and minister officiating in any such church or chapel as aforesaid, for whom a maintenance of the yearly value of 80 l is not sufficiently provided; and the distances of such churches and chapels from London; and which of them are in towns corporate or market towns, and which not; and how they are supplied with preaching ministers; and where the incumbents have more than one living.

And that they shall have a secretary and treasurer, and such inferior officers substitutes and servants as they shall think fit; to be chosen by a majority of votes at a general court, and to continue during the pleasure of the said governors: the secretary and treasurer to be first sworn at a general court, for the due and faithful execution of their offices; and the treasurer to give security for his faithful accounting for the monies he shall receive by virtue of the said office.

And with power to admit into their said corporation all such persons who shall be piously disposed to contribute towards such augmentation as the said governors in a general court shall think fit.

And that they shall cause to be entered in a book to be kept for that purpose, the names of all the contributors with their several contributions; to the end a perpetual memorial may be had thereof, and whereby the treasurer may be charged with the more certainty in his account.

And

And by the 1 G. 2. c. 10. The courts and committees of the said governors shall have power to administer an oath to such persons as shall give them information or be examined concerning any thing relating to the execution of their trust. *f. 19.*

4. And in pursuance of the said letters patents, the following rules and orders have been established: viz.

Rules and orders made in pursuance of the said letters patents.

(1) That the augmentations to be made by the said corporation shall be by the way of purchase, and not by the way of pension.

(2) That the stated sum to be allowed to each cure which shall be augmented be 200 l, to be invested in a purchase, at the expence of the corporation.

(3) That as soon as all the cures not exceeding 10 l *per annum*, which are fitly qualified, shall have received our bounty of 200 l; the governors shall then proceed to augment those cures that do not exceed 20 l *per annum*; and shall augment no other till those have all received our bounty of 200 l: except in the cases, and according to the limitations hereafter named. And that from and after such time as all the cures not exceeding 10 l a year, which are fitly qualified, shall have received our bounty of 200 l; the like rules, orders, and directions shall be from thenceforth by the governors observed and kept, in relation to cures not exceeding 20 l a year, as are now in force and ought to be by them observed and kept, in relation to cures not exceeding 10 l a year.

(4) That in order to encourage benefactions from others, and thereby the sooner to compleat the good intended by our bounty; the governors may give the sum of 200 l to cures not exceeding 45 l a year, where any persons will give the same or a greater sum, or the value thereof in lands, tithes, or rent charges.

(5) That the governors shall every year, between Christmas and Easter, cause the account of what money they have to distribute that year to be audited; and when they know the sum, publick notice shall be given in the gazette or such other way as shall be judged proper, that they have such a sum to distribute in so many shares, and that they will be ready to apply those shares to such cures as want the same and are by the rules of the corporation qualified to receive them, where any persons will add the like or greater sum to it, or the value in land or tithes, for any such particular cure.

(6) That if several benefactors offer themselves, the governors shall first comply with those that offer most.

First fruits and tenths.

(7) Where the sums offered by other benefactors are equal, the governors shall always prefer the poorer living.

(8) Where the cures to be augmented are of equal value, and the benefactions offered by others are equal; there they shall be preferred that first offer.

(9) Provided nevertheless, that the preference shall be so far given to cures not exceeding 20 l a year; that the governors shall not apply above one third part of the money they have to distribute that year, to cures exceeding that value.

(10) Where the governors have expected till Michaelmas what benefactors will offer themselves, then no more proposals shall be received for that year; but if any money remain after that to be disposed of, in the first place two or more of the cures in the gift of the crown, not exceeding 10 l a year, shall be chosen by lot, to be augmented preferably to all others; the precise number of these to be settled by a general court, when an exact list of them shall be brought in to the governors.

(11) As for what shall remain of the money to be disposed of after that, a list shall be taken of all the cures in the church of England not exceeding 10 l a year; and so many of them be chosen by lot, as there shall remain sums of 200 l for their augmentation.

(12) Provided, that when all the cures not exceeding 20 l a year, which are fully qualified, shall be so augmented; the governors shall then proceed to augment those of greater value, according to such rules, as shall at any time hereafter be proposed by them, and approved by us, our heirs or successors, under our or their sign manual.

(13) That all charitable gifts, in real or personal estates, made to the corporation, shall be strictly applied according to the particular direction of the donor or donors thereof, where the donor shall give particular direction for the disposition thereof: and where the gift shall be generally to the corporation, without any such particular direction, the same shall be applied as the rest of the fund or stock of the corporation is to be applied.

(14) That a book shall be kept, wherein shall be entered all the subscriptions, contributions, gifts, devises or appointments, made or given, of any monies, or of any real or personal estate whatsoever, to the charity mentioned in the charter, and the names of the donors thereof, with the particulars of the matters so given; the same book to be kept by the secretary of the corporation.

(15) That a memorial of the benefactions and augmentations made to each cure shall, at the charge of the corporation, be set up in writing on a stone to be fixed in
the

the church of the cure so to be increased, there to remain in perpetual memory thereof.

(16) When the treasurer shall have received any sum of money, for the use of the corporation, he shall, at the next general court to be holden after such receipt, lay an account thereof before the governors: who may order and direct the same to be placed out, for the improvement thereof, upon some publick fund or other security, till they have an opportunity of laying it out in proper purchases, for the augmentation of cures.

(17) That the treasurer do account annually before such a committee of the governors, as shall be appointed by a general court of the said corporation; who shall audit and state the same: and the said account shall be entered in a book to be kept for that purpose, and shall be laid before the next general court after such stating; the same to be there re-examined and determined.

(18) The persons whose cures shall be augmented, shall pay no manner of fee or gratification to any of the officers or servants of this corporation.

And by the 1 G. 2. c. 10. it is enacted, that all such rules and orders as shall from time to time be by the governors agreed upon, prepared, and proposed to the king, according to the true intent of the said letters patent and by him approved under his *sign manual*, shall be as good as if they were established under the *great seal*. s. 3.

5. By the 5 An. c. 24. All benefices with cure of souls, not exceeding the clear improved yearly value of 50 l (as hath been said) are discharged from first fruits and tenths; and the bishops and guardians of the spiritualties sede vacante were to inform themselves of the values of all such benefices. Ascertaining the valuation of livings to be augmented.

And by the 1 G. 2. c. 10. The bishops of every diocese, and the guardians of the spiritualties sede vacante, are impowered and required, from time to time, as they shall see occasion, as well by the oath of two or more witnesses (which they or others commissioned by them under their hands and seals are impowered to administer) as by all other lawful ways and means, to inform themselves of the clear improved yearly value of every benefice with cure of souls, living, and curacy within their several dioceses, or within any peculiars or places of exempt jurisdiction, within the limits of their respective dioceses, or adjoining and contiguous thereunto, altho' the same be exempt from the jurisdiction of any bishop in other cases,

First fruits and tenths.

and how such yearly values arise, with the other circumstances thereof; and the same, or such of them whereof they shall have fully informed themselves, from time to time, with all convenient speed to certify under their hands and seals, or seals of their respective offices, to the governors of the bounty. *f. 1.*

Provided, that where by certificates returned into the exchequer by the 5 *An. c. 24.* the yearly value of any livings not exceeding the clear yearly value of 50 l are particularly and duly expressed and specified, such certificates shall ascertain the yearly value of such livings, in order to their being augmented; and no new or different valuation thereof shall be returned to the said governors by this act. *f. 2.*

Agreement with
benefactors for
the nomination.

6. All agreements with benefactors, with the consent and approbation of the governors, touching the patronage or right of presentation, or nomination to such augmented cure, made for the benefit of such benefactor, his heirs or successors, by the king under his sign manual, or by any bodies politick or corporate, or by any person of the age of twenty one years, having an estate of inheritance in fee simple or fee tail in his own right, or in the right of his church, or of his wife, or jointly with his wife made before coverture or after, or having an estate for life or for years determinable upon his own life, with remainder in fee simple or fee tail to any issue of his own body, in such patronage or right of presentation, or nomination in possession, reversion, or remainder, shall be good and effectual in the law; and the advowson, patronage, and right of presentation and nomination to such augmented churches and chapels, shall be vested in such benefactors, their heirs and successors, or the said bodies politick and corporate, and their successors, or the said respective persons as aforesaid, as fully as if the same had been granted by the king under his great seal, and as if such bodies politick or corporate had been free from any restraint, and as if such other person so agreeing had been sole seized in their own right of such advowson, patronage, right of presentation, and nomination in fee simple, and had granted the same to such benefactors, their heirs and successors respectively, according to such agreements. *1 G. 3. c. 10. f. 8.*

And the agreements of guardians on the behalf of infants or idiots, shall be effectual as if the said infants or idiots had been of full age and sound mind, and had themselves entered into such agreements. *f. 9.*

But in case of such agreement by any parson or vicar, the same shall be with the consent and approbation of his patron and ordinary. *f. 10.*

And in case of such agreement made by any person seized in right of his wife, the wife shall be a party to the agreement, and seal and execute the same. *f. 11.*

And such agreements with benefactors so made as aforesaid, shall be as effectual for the supplying cures vacant at the time of such augmentation made or proposed, as for the advowson or nomination to future vacancies. *f. 12.*

7. And where it shall fall to the lot of any donative, curacy, or chapelry to receive an augmentation, according to the rules established or to be established; it shall be lawful for the governors, before they make the augmentation, to treat and agree with the patron of any donative, impropiator of any rectory impropriated without endowment of any vicarage, or parson, or vicar of any mother church, for a perpetual, yearly or other payment or allowance to the minister or curate of such augmented donative, curacy, or chapelry, and his successors, and for charging with and subjecting the impropriate rectory or the mother church or vicarage thereunto, in such manner and with such remedies as shall be thought fit: and such agreements made with the king under his sign manual, or with any bodies politick or corporate, or any other person having any estate or interest in possession reversion or remainder in any such impropriate rectory in his own right or in the right of his church or of his wife, or with the guardian of any person having such estate or interest, or with any parson or vicar of any mother church, shall be as effectual with respect to such charges, as agreements made with the king or with the same persons or bodies politick or corporate touching the patronage or right of presentation or nomination. And if such impropiator other than the king, and such parson or vicar, will not or shall not make such agreement with the said governors; the said governors may refuse such augmentation, and apply the money arising from the bounty which ought to have been employed therein, for augmenting some other cure, according to the rules then in force. *f. 16.*

8. And whereas the augmentation is intended for the maintenance, not only of parsons and vicars, but also of curates and other ministers officiating in churches or chapels; therefore, for the preventing of all doubts touching the capacity of such ministers who are to receive the benefit of

Agreement with patrons and others for a stipend, in case of augmentation by lot.

Capacity of ministers for receiving the augmentation.

first fruits and tenths.

such augmentation; it is enacted, that when any part or portion of the first fruits or tenths shall be annually or otherwise applied or disposed of towards the maintenance of any minister officiating in any church or chapel as aforesaid, such part or portion shall from thenceforth for ever be in the like manner continued to the minister from time to time so officiating in the same church or chapel: and every such minister, whether parson, vicar, curate, or other minister for the time being, so officiating in such church or chapel, shall enjoy the same for ever. 5 *An. c. 24. s. 4.*

**Augmentation
of benefices
vacant.**

9. And to the end that churches and chapels may at all times be capable of receiving augmentations; if the governors shall, by any deed or instrument in writing under their common seal, allot or apply to any church or chapel any lands, tithes, or hereditaments arising from the said bounty, or from private contribution or benefaction, and shall declare that the same shall be for ever annexed to such church or chapel; then such lands, tithes, and hereditaments shall from thenceforth be held and enjoyed, and go in succession with such church and chapel for ever: and such augmentation so made shall be good and effectual to all intents and purposes, whether such church or chapel for which such augmentation is intended, be then full or vacant of an incumbent or minister; provided, such deed or instrument be inrolled in the chancery, within six months after the day of the date thereof. 1 *G. s. 2. c. 10. s. 21.*

**Benefices augmented shall be
perpetual cures.**

10. And all churches, curacies, or chapels which shall be augmented by the governors of the bounty, shall be from the time of such augmentation perpetual cures and benefices; and the ministers duly nominated and licensed thereunto, and their successors respectively, shall be in law bodies politick and corporate, and shall have perpetual succession by such name and names as in the grant of such augmentation shall be mentioned, and shall have a legal capacity, and be enabled to take in perpetuity to them and their successors, all such lands, tenements, tithes, and hereditaments, as shall be granted unto or purchased for them respectively by the said governors, or other persons contributing with the said governors as benefactors. And the impropriators or patrons of any augmented churches or donatives for the time being, and their heirs, and the rectors and vicars of the mother churches whereunto any such augmented curacy or chapel doth appertain, and their successors, shall be utterly excluded from having or receiving directly or indirectly any profit or benefit by
such

such augmentation, and shall pay and allow to the ministers officiating in any such augmented church and chapel respectively, such annual and other pensions, salaries, and allowances, which by ancient custom or otherwise of right, and not of bounty, ought to be by them respectively paid and allowed, and which they might by due course of law, before the making of this act, have been compelled to pay or allow, and such other yearly sum or allowance as shall be agreed upon (if any shall be) between the said governors and such patron or impropiator upon making the augmentation, and the same shall be perfectly vested in the ministers officiating in such augmented church or chapel respectively, and their successors. 1 G. 2. c. 10. f. 4.

Provided, that no such rector or vicar of such mother church, or any other ecclesiastical person having cure of souls within the parish or place where such augmented church or chapel shall be situate, shall hereby be devested or discharged from the same; but the cure of souls, with all other parochial rites and duties, (such augmentation and allowances to the augmented church or chapel as aforesaid only excepted,) shall remain in the same state plight and manner as before the making of this act. f. 5.

11. And if such augmented cures be suffered to remain void for six months, without a nomination within that time of a fit person to serve the same (by the person having right of nomination) to be licensed for that purpose; the same shall lapse to the bishop or other ordinary, and from him to the metropolitan, and from the metropolitan to the crown, according to the course of law used in cases of presentative livings: and the right of nomination to such augmented cure may be granted or recovered, and the incumbency thereof shall cease and be determined, in like manner as in a vicarage presentative. 1 G. 2. c. 10. f. 6.

Provided, that if the person intitled to nominate in such augmented cure shall suffer lapse to incur, but shall nominate before advantage taken thereof; such nomination shall be as effectual as if made within six months, altho' so much time be elapsed as that the title of lapse be vested in the crown. f. 7.

12. All donatives exempt from ecclesiastical jurisdiction, and augmented by virtue of the powers given by this act, shall be subject to the visitation and jurisdiction of the bishop of the diocese. 1 G. 2. c. 10. f. 14.

But no donative shall be augmented without the consent of the patron in writing under his hand and seal. f. 15.

First fruits and tenths.

Exchanging of
lands settled by
the augmenta-
tion.

Registry to be
kept of all
matters relating
to the augmen-
tation.

13. It shall be lawful, with the concurrence of the governors, and the incumbent, patron, and ordinary of any augmented living or cure, to exchange all or any part of the estate settled for the augmentation thereof, or any other estate in lands or tithes, of equal or greater value, to be conveyed to the same uses. 1 G. 2. c. 10. s. 13.

14. By the 1 G. 2. c. 10. All the augmentations certificates agreements and exchanges to be made by virtue of this act, shall be carefully examined and entered in a book to be provided and kept by the governors for that purpose: which said entries being approved at a court of the said governors, and attested by the governors then present, shall be taken to be as records; and the true copies thereof, or of the said entries, being proved by one witness, shall be sufficient evidence in law, touching the matters contained therein or relating thereto. s. 20.

The number of livings capable of augmentation hath been certified as follows: 1071 livings not exceeding 10 l a year, which may be augmented (by the bounty alone) six times, pursuant to the present rules of the governors, which will make 6426 augmentations; 1467 livings above 10 l and not exceeding 20 l a year, may be augmented four times each, which will make 5868 augmentations; 1126 livings above 20 l and not exceeding 30 l a year, may be augmented three times each, which will make 3378 augmentations; 1049 livings above 30 l and not exceeding 40 l a year, may be augmented twice each, which will make 2098 augmentations; 884 livings above 40 l and not exceeding 50 l a year, may be each once augmented, which will make 884 augmentations. So that in the whole there are 5597 livings certified under 50 l a year, which will require (by the bounty alone) 18654 augmentations, before they will be advanced to 50 l a year each. And thereupon, computing the clear amount of the bounty to make fifty-five augmentations yearly, it will be 339 years from the year 1714 (which was the first year in which any augmentations were made) before all the said livings can exceed 50 l a year. And if it be computed, that half of such augmentations may be made in conjunction with other benefactors (which is improbable) it will require 226 years before all the livings already certified will exceed 50 l a year (n).

(n) See on this subject a note of Mr. Christian to 1 B/. Com. 285.

The form of a deed of gift of money, to be executed by the donor; as the same hath been settled, and generally used, since the mortmain act of the 9 G. 2. c. 36.

THIS INDENTURE made the — day of — in the year of our Lord — Between A. B. of C. in the county of D. — of the one part; and the governors of the bounty of queen Anne for the augmentation of the maintenance of the poor clergy, of the other part; Witnesseth, that the said A. B. hath given and granted, and by these presents doth give and grant, unto the said governors, the sum of — to be by them disposed of and laid out, for a perpetual augmentation of the [vicarage] of E. in the county of F. and diocese of G. pursuant to the rules and orders made and established under the great seal of Great Britain for the disposition of the said bounty. Which said sum of — the said A. B. doth hereby covenant and promise to and with the said governors, to pay forthwith into the revenue of the said governors, to take effect in possession for the use and purpose aforesaid, immediately from the making hereof. In witness, &c.

Note; this deed must be ingrossed upon a five shilling stamp; and when executed, must be acknowledged by the donor, before a master, or master extraordinary, in chancery; and afterwards inrolled in chancery. And if the donor dies within 12 calendar months after the execution of such deed, the gift will be void.---Nor is any living capable (by the present rules) of being augmented, which exceeds 45 l. a year.---The money given must be actually paid into the governors hands, as soon as may be after the execution of such deed or gift.

Where any augmentation is intended with lands or tithes; such lands or tithes must be immediately conveyed, by deed of bargain and sale, to be executed in manner aforesaid, and inrolled in chancery, according to the said act.

Form of an instrument, now usually executed by the governors, when any benefactor desires it.

WHEREAS A. B. of C. in the county of D. — bath by his deed indented, bearing date the — day of — last past, duly attested and inrolled in his majesty's high court of chancery, given and granted unto the governors of the bounty of queen Anne for the augmentation of the main-
tenance

tenance of the poor clergy, the sum of 200*l* for the augmentation of the [vicarage] of E. in the county of F. and diocese of G. Now the said governors do hereby promise to give the sum of 200*l* out of their revenue, to be added thereto: the whole to be disposed of, and laid out, for the perpetual augmentation of the said [vicarage] of E. pursuant to the rules and orders made and established under the great seal of Great Britain, for the distribution of the said bounty. Provided always that the said gift and grant be made complete and effectual, according to the statute made in the ninth year of the reign of his late majesty king George the second, intituled, An act to restrain the disposition of lands, whereby the same become unalienable. In witness whereof, the said governors have caused their common seal to be hereunto affixed this ——— day ——— in the year of our Lord ———

Font.

1. **A**T first baptism was administered publicly, as occasion served, by rivers: afterwards the baptistry was built at the entrance of the church, or very near it; which had a large basin in it, that held the persons to be baptized, and they went down by steps into it. Afterwards, when immersion came to be disused, fonts were set up at the entrance of churches. 1 Still. 146.

2. Edm. *There shall be a font of stone or other competent material in every church, which shall be decently covered and kept, and not converted to other uses. And the water, wherein the child shall be baptized, shall not be kept above seven days in the font.* Lind. 241.

Or other competent material] In which the child may be dipped. *Id.*

3. Edm. *The fonts shall be kept locked up, for fear of sorcery.* Lind. 247.

For fear of sorcery] This was some vulgar superstition, which Lindwood says, it is better to say nothing of, than to explain. *Id.*

4. By the rubrick of the 2 Ed. 6. it was ordered, that the water in the font should be changed once in every month at the least.

And on changing the water, there was a new benediction of it.

5. By can. 81. *According to a former constitution too much neglected in many places, there shall be a font of stone in every church and chapel where baptism is to be ministered, the same to be set in the ancient usual places: in which only font the minister shall baptize publicly.*

Former constitution] That is, amongst the canons made in the year 1571.

Fornication. See *Lechdness*.

General council. See *Synod*.

Gilbertine monks. See *Monasteries*.

Glebe lands.

1. **EVERY** church of common right is intitled to ^{Every church to} have a glebe. And the assigning of these at ^{house and glebe.} the first, was of such absolute necessity, that without them no church could be regularly consecrated. *Gibf. 661. (c)*

2. The

(c) The house and glebe are both comprehended under the word *manse*, of which the rule of the canon law is, *sanctum est ut unicuique ecclesie unus mansus integer absque ullo servitio tribuatur. Spelm. in verb. X. 3. 39. 1. Lind. 254.* By the 17 G. 3. c. 52. intituled, "An act to promote the residence of the parochial clergy," &c. explained by the 21 Geo. 3. c. 64. it is provided that the incumbent of any ecclesiastical living whereon there is no house, or the house is so ruinous that one year's rent will not suffice to repair it, may, with the consent of the ordinary and patron, borrow a sum of money not exceeding two years produce of such living, for the purpose of repairing the old house, or building a new one, and may mortgage the glebe, tithes, and other profits of the living, for twenty-five years, or until the money so borrowed, with interest and costs, shall be repaid. To effect this repayment, the incumbent shall besides interest, if resident, pay to the mortgagee five per cent, if non-resident ten per cent. per annum of the principal sum. If the living exceed in clear yearly value 100l,

Glebe lands are
in abeyance.

2. The fee simple of the glebe is in *abeyance*; from the French *bayer*, to expect: that is, it is only in the remembrance, expectation, and intendment of law. 1 *Inst.* 342. (p)

And this was provided by the wisdom of the law, for that the parson and vicar have the cure of souls, and are bound to celebrate divine service, and administer the sacraments: and therefore no act of the predecessor shall make a discontinuance, to take away the entry of the successor, and to drive him to a real action, whereby he might be destitute in the mean time. 1 *Inst.* 341.

Freehold thereof
in the parson.

3. After induction, the freehold of the glebe is in the parson. *Gibf.* 661.

Yet not alien-
able.

4. But yet he may not alienate the same: Concerning which, it was of antient time ordained by a constitution of archbishop Langton as followeth; *Being willing to provide for the indemnities of churches, we do establish by the authority of this present council, that no abbot, prior, archdeacon, dean or other having any parsonage or dignity, nor any inferior clerk shall presume to sell, mortgage, infeof de novo, or in any other manner alienate (without observing the form of the canon) the possessions or revenues of the dignity or church committed to them, to their kinsfolk or friends, or to any other whatsoever. And if any one shall presume to do contrary hereunto, the same shall be void; and he who so presumeth shall be deprived by his superior of the parsonage or church which he hath injured, unless within a time to be appointed by his superior, he shall restore at his own expence without damage to the church, that which he shall have alienated. And moreover, he who shall receive any ecclesiastical goods, and after admonition shall presume to detain the same, shall be excommunicated, and not absolved until he shall make restitution. And also the greater prelates shall observe the same.* Lind. 149.

Infeoff de novo] That is, so as that the grantee shall take to himself, and his successors, the fruits and profits of the thing granted in fee, the estate remaining in the grantor. Lind. 149.—This was before the statute of

1001, and there be no house on it, or it be ruinous, and the incumbent shall not think fit to lay out one year's income in repairing it, nor make application for the benefit of this act, and shall not reside during 20 weeks within any year, the patron and ordinary may mortgage the living without him, for the above purposes. See tit. *Wastage*.

(p) See *Abeyance*.

Quia

Quia emptores terrarum, which prohibits all such grants in general.

Without observing the form of the canon] That is, the bishop might not do the same without consent of the chapter; nor other ecclesiasticks, without the consent of the bishop. 1 *Inst.* 144. 3 *Co.* 75. (9)

Greater prelates] That is, greater than the abbot: and so this constitution extendeth also to the bishops. *Lind.* 150.

And by the statute of the 13 Ed. 1. ft. 1. c. 41. Our lord the king hath ordained, that if abbots, priors, keepers of hospitals and other religious houses founded by him or by his progenitors, do from henceforth aliene the lands given to their houses by him or by his progenitors; the land shall be taken into the king's hands, and holden at his will, and the purchaser shall lose his recovery as well of the lands as of the money that be paid. And if the house were founded by an earl, baron or other person; for the lands so aliened, he from whom or from whose ancestor the land so aliened was given, shall have a writ to recover the same land in demesne. In like manner for lands given for the maintenance of a chantry, or of a light in a church or chapel, or other alms to be maintained, if the land given be aliened: but if the land so given for a chantry, light, sustenance of poor people, or other alms to be maintained or done, be not aliened, but such alms is withdrawn by the space of two years; an action shall lie for the donor or his heirs, to demand the land so given in demesne, as it is ordained in the statute of Gloucester for lands leased to do, or to render the fourth part of the value of the land, or more.

If abbots, priors, keepers of hospitals and other religious houses] Seeing this act beginneth with abbots, and concludeth with other religious houses; bishops are not comprehended within these words, for they are superior to abbots, and these words [*other religious houses*] shall extend to houses inferior to them that were mentioned before. 2 *Inst.* 457.

Or other alms to be maintained] This latter clause extendeth to lands or tenements given to any ecclesiastical person; that is, either religious, as abbots, or priors; or secular, as parsons of churches or others, for the finding of a chantry priest, or of a light, or any other charity or alms-deeds, or when a chantry is incorporated, and lands given for maintenance of the same. 2 *Inst.* 459.

Glebe lands.

And this branch being general, the same extendeth as well to bishops and all other secular persons or ecclesiastical as religious, consisting of one sole person or aggregate of many. 2 *Inst.* 459.

Statute of Gloucester] Which is that of the 6 *Ed.* 1. c. 4. which ordaineth, that if a man let his land to farm, or to find estovers, in meat or in cloth, amounting to the fourth part of the very value of the land, and he which holdeth the land so charged letteth it lie fresh, so that the party can find no distress there by the space of two or three years to compel the farmer to render or to do as is contained in the writing or lease; the two years being passed, the lessor shall have an action to demand the land in demesne by a writ out of the chancery.

Yet still, they might have aliened, tho' not of themselves, yet with proper consent as aforesaid: for at the common law, if the bishop with the assent of his chapter, or the abbot with the assent of his convent, and the like, had aliened the land, the estate of the alienee could not have been avoided; for they having a fee simple, were not restrained from alienation. But now, by the statutes of the 1 *Eliz.* c. 19. and 13 *Eliz.* c. 10. all gifts, grants, feoffments, conveyances or other estates, if they be contrary to the tenor of the said acts respectively, shall be utterly void and of none effect; notwithstanding any consent or confirmation whatsoever. 2 *Inst.* 457.

For by the 1 *Eliz.* c. 19. with regard to bishops, it is enacted, that *all gifts, grants, feoffments, fines, or other conveyances or estates, to be had made done or suffered, by any archbishop or bishop, of any honours, castles, manors, lands, tenements, or other hereditaments, being parcel of the possessions of his archbishoprick or bishoprick, or belonging to the same, to any person or persons, bodies politick or corporate, whereby any estate should or may pass from the same archbishop or bishop, or any of them; other than for the term of twenty-one years, or three lives, from such time as any such lease grant or assurance shall begin, and whereupon, the old accustomed yearly rent or more shall be reserved and payable yearly during the said term of twenty-one years or three lives,—shall be utterly void and of none effect.*

And by the 13 *El.* c. 10. with regard to all other spiritual persons and corporations, it is enacted as followeth: *For that long and unreasonable leases made by colleges, deans and chapters, parsons, vicars, and other having spiritual promotions, be the chiefest causes of the dilapidations and the decay of all spiritual livings and hospitality, and the utter impoverish-*

ing of all successors incumbents in the same; it is enacted, that all leases, gifts, grants, feoffments, conveyances, or other estates to be made had done or suffered, by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other having any spiritual or ecclesiastical living or any houses lands tithes tenements or other hereditaments, being parcel of the possessions of any such college cathedral church chapel hospital parsonage vicarage or other spiritual promotion, or any ways appertaining or belonging to the same, to any person or persons bodies politick or corporate (other than for the term of one and twenty years, or three lives, from the time that any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved and payable during the said term) shall be utterly void and of none effect.

So that now they may not alienate, altho' with consent as aforesaid, for longer term than twenty-one years or three lives.

5. Nor by the same rule may they exchange, though Exchange. they do it with like consent; as it was laid down in *Turber's case*, *T. 40 Eliz.* where the parson exchanged his glebe land, and died; and though the successor, by entering into the exchanged lands and taking the profits did bind himself for his own time (being made before the 13 *Eliz.*) it was declared, that no such exchange since the 13 *Eliz.* could be good. Yet in the chancery reports 5 *C.* in the case of *Morgan and Clerk*, we find a decree made to confirm an exchange of glebe for other lands. *Gibf. 661.* But this is usually done by act of parliament.

But as exchanges in either of the ways abovementioned cannot be made without considerable expence, it hath been sometimes practised (especially in laying together small quantities of land for the sake of inclosure and improvement) for the incumbent to make an exchange during his own time, in which his successors also will find the same advantage; until by length of time all remembrances where the lands formerly lay shall be worn out: which although it doth not operate to effect a legal title, yet no person being grieved thereby, will probably never be inquired into and disannulled.

And by the 1 *G. 2. c. 10.* where a benefice hath been augmented by the governors of queen Anne's bounty, it shall be lawful, with the concurrence of the said governors, and the incumbent, patron, and ordinary, to exchange all or any part of the estate settled for the augmentation

mentation thereof, for any other estate in lands or tithes of equal or greater value.

Wastes.

6. So also they may not commit waste, by felling wood, or the like; and if they do, a prohibition will be granted, for which there is a writ in the register. *Gibf.* 661. (r).

But it hath been adjudged, that the digging of mines in glebe lands is not waste, and accordingly, when a prohibition was prayed in the 15 C. 2. by the earl of Rutland, it was denied; for said the court, If this were accounted waste, no mines that are in glebe lands could ever be opened. 1 *Lev.* 107. 1 *Sid.* 152.

Tithes of glebe lands.

7. Glebe lands in the hands of the parson shall not pay tithe to the vicar, though endowed generally of the tithes of all lands within the parish; nor being in the hands of the vicar shall they pay tithe to the parson: and this is according to the known maxim of the canon law, that the church shall not pay tithes to the church. But if the vicar be specially endowed of the small tithes of the glebe lands of the parsonage, then he shall have them, though they are in the hands of the appropriator. *Gibf.* 661. *Deq.* p. 2. c. 2. (s)

If a parson lease his glebe lands, and do not also grant the tithes thereof, the tenant shall pay the tithes thereof to the parson. *Deq.* p. 2. c. 2. 1 *Roll's Abr.* 655.

And if a parson lets his rectory, reserving the glebe lands; he shall pay the tithes thereof to his lessee. *Gibf.* 661.

Incumbent lying.

8. By the 28 H. 8. c. 11. *If any incumbent shall die, and before his death hath caused any of his glebe lands to be manured and sown at his proper costs and charges with any corn or grain; in such case every such incumbent may make his testament of all the profits of the corn growing upon the said glebe lands so manured and sown.* s. 6.

But if his successor is inducted before the severance thereof from the ground, the successor shall have the tithe thereof; for although the executor represent the person of the testator, yet he cannot represent him as parson, inasmuch as another is inducted. 1 *Roll's Abr.* 655.

(r) Or an injunction from chancery. See *Disputations*, in the note.

(s) *Moore*, 457. 479. 910. *Sav.* 3. 1 *Brownl.* 69. *Cro. Eliz.* 479. 578. *Novum genus exactionis est ut clerici a clericis decimas exigant, cum nusquam in lege domini hoc legamus; non enim levitæ a levitis decimas accipisse leguntur.* X. 30. 2.

Otherwise,

Otherwise, if the parson dieth after severance from the ground, and before the corn is carried off; in this case, the successor shall have no tithe: because, tho' it was not set out, yet a right to it was vested in the deceased parson by the severance from the ground. The same is true in case of deprivation, or resignation, after glebe sown: the successor shall have the tithe, if the corn was not severed at the time of his coming in; otherwise if severed. *Gibf.* 662. (1)

Goods of the church. See Church.

Grace.

GRACE is sometimes used for a faculty, licence, or dispensation; but this seemeth to be only in case where the matter proceedeth as it were *ex gratia*, of grace and favour; and not where the licence or dispensation is granted of course, or of necessity. *Ayl. Par.* 353.

Grail.

GRAIL, *gradale*, is that book which containeth all that was to be sung by the quire at high mass; the tracts, sequences, hallelujahs; the creed, offertory, trisagium, as also the office for sprinkling the holy water. *Lindw.* 251.

Guardian. See Wills.

Guardian of the spiritualties. See Bishops.

Gunpowder treason. See Holidays.

(1) Per Coke, Ch. J. 2 Bulst. 184.

Hearth

hearth penny.

HEARTH PENNY is a prescription for the title of wood cut down and used for fuel.

heresy.

Heresy, what. 1. **I**T seemeth, that among protestants heresy is taken to be a false opinion repugnant to some point of doctrine clearly revealed in scripture, and either absolutely essential to the christian faith, or at least of most high importance. 1 *Haw.* 3.

But is impossible to set down all the particular errors which may properly be called heretical, concerning which there are and always have been so many intricate disputes: however the following statute of the 1 *El. c. 1.* which erected the high commission court, having restrained the same from adjudging any points to be heretical, but such as are therein expressed; it hath been since generally holden, that altho' the high commission court was abolished by the statute of the 16 *C. 1. c. 11.* yet those rules will be good directions to ecclesiastical courts in relation to heresy. 1 *Haw.* 4.

By which said statute of the 1 *El. c. 1.* it is enacted as followeth: *All such jurisdictions privileges superiorities and preeminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority have heretofore been or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation order and correction of the same, and of all manner of heresies schisms abuses offences contempts and enormities, shall for ever be united and annexed to the imperial crown of this realm.* §. 17.

And such persons to whom the queen shall by letters patents under the great seal give authority to execute any jurisdiction spiritual, shall not in any wise have power to adjudge any matter or cause to be heresy, but only such as heretofore have been adjudged to be heresy, by the authority of the canonical scriptures, or by some of the first four general councils, or by any other general council wherein the same was declared heresy by the express and plain words of the said canonical scriptures, or such as hereafter shall be judged or determined to be heresy,
by

by the high court of parliament, with the assent of the clergy in the convocation. 1. 36.

And this is the first boundary that was set to the extent of heresy as to the matter thereof, what only shall be adjudged heresy. 1 H. H. 406.

The ground of making which limitation was a retrospect to the times of popery, in which every thing was adjudged heresy, that the church of Rome thought fit to call by that name, how far soever in its own nature from being fundamental, or from being contrary to the gospel and the ancient doctrine of the catholick church; such as speaking against pilgrimages, against the worship of images, against the necessity of auricular confessions, and the like. *Gibf.* 352.

Inasmuch that the canon law reckons up eighty-eight different sorts of heresy. *Ayl. Par.* 290.

The act indeed is not so particular and certain, as might have been wished; for according to the inclination of the judge, possibly some would determine that to be heresy by the canonical scriptures which is not at all heresy, nor contrary to the canonical scriptures; but howsoever, it brought heresy to a greater certainty than before. 1 H. H. 407.

2. Lord Hale says; Before the time of Richard the second, that is, before any acts of parliament were made about hereticks, it is without question, that in a convocation of the clergy or provincial synod, they might and frequently did here in England proceed to the sentencing of hereticks. 1 H. H. 390.

Power of the convocation to inquire thereof.

Mr. Hawkins says; It is certain that the convocation may declare what opinions are heretical: but it hath been questioned of late, whether they have power at this day to convene and convict the heretick. 1 *Haw.* 4.

And Dr. Gibson saith; How far the convocation of each province, which had once an undoubted right to convict and punish hereticks in a synodical manner, doth still retain or not retain that authority, he will not presume to say; until the judges shall be clear and final in their opinions, and that point shall have received a judicial determination. *Gibf.* 353.

3. The diocesan alone, as to ecclesiastical censures, may doubtless proceed to sentence heresy. 1 H. H. 392. 1 *How.* 4.

Power of the ordinary.

And so might he have done at common law, before any statute for heresy was made. 3 *Inst.* 39.

But it is said, that no spiritual judge, who is not a bishop, hath this power. 1 *Haw.* 4.

And it hath been questioned, whether a conviction before the ordinary were a sufficient foundation, whereon to ground the writ *de hæretico comburendo*, as it is agreed that a conviction before the convocation was. 1 *Haw.* 4.

For anciently, the temporal courts would not usually burn the offender, without a sentence from a provincial synod. 1 *H. H.* 392.

Power of the
temporal courts,

4. It is certain, that a man cannot be proceeded against at the common law in a temporal court merely for heresy; yet if in maintenance of his errors he set up conventions and raise factions, which may tend to the disturbance of the public peace, it seemeth that he may in this respect be fined and imprisoned upon an indictment at the common law. 1 *Haw.* 4.

Also a temporal judge may incidentally take knowledge, whether a tenet be heretical or not: as where one was committed by force of the statute of the 2 *H. 4. c.* 15. (which is now repealed), for saying that he was not bound by the law of God, to pay tithes to the curate; and another, for saying that tho' he was excommunicate before men, yet he was not so before God; the temporal courts, on an *habeas corpus* in the first case, and an action of false imprisonment in the other, adjudged neither of the points to be heresy within that statute; for the king's courts will examine all things which are ordained by statute. 1 *Haw.* 4.

Also in a *quare impedit*, if the bishop plead that he refused the clerk for heresy; it seems that he must set forth the particular point, that it may appear to be heretical to the court wherein the action was brought, which having cognizance of the original cause must by consequence have a power as to all incidental matters necessary for the determination thereof. 1 *Haw.* 4.

But if a person be proceeded against as an heretick in the spiritual court *pro salute animæ*, and thinking himself aggrieved, his proper remedy seems to be, to bring his appeal to a higher ecclesiastical court, and not to move for a prohibition from a temporal one; which, as it seems to be agreed, cannot regularly determine or discuss, what shall be called heresy. 1 *Haw.* 4.

Unpunishable,

5. There is no doubt, but that at the common law one convicted of heresy, and refusing to abjure it, or falling into it again after he had abjured it, might be burned by force of the writ *de hæretico comburendo*, which was grantable out of chancery upon a certificate of such conviction; but it is said, that he forfeited neither lands nor goods, because the

the proceedings against him were only *pro salute animæ*. But at this day, the said writ *de hæretico comburendo* is abolished by the statute of the 29 C. 2. c. 9. and all the old statutes which gave a power to arrest or imprison persons for heresy, or introduced any forfeiture on that account, are repealed: yet by the common law, an obstinate heretick being excommunicate, is still liable to be imprisoned by force of the writ *de excommunicato capiendo*, till he make satisfaction to the church. 1 *Haw.* 4, 5.

By which said statute of the 29 C. 2. c. 9. it is enacted that the writ commonly called breve *de hæretico comburendo*, with all process and proceedings thereupon in order to the executing such writ, or following or depending thereupon, and all punishment by death, in pursuance of any ecclesiastical censures, shall be utterly taken away and abolished. s. 1.

Provided, that nothing in this act shall extend to take away or abridge the jurisdiction of protestant archbishops or bishops, or any other judges of any ecclesiastical courts, in case of atheism, blasphemy, heresy, or schism, and other damnable doctrines and opinions; but that they may proceed to punish the same according to his majesty's ecclesiastical laws, by excommunication, deprivation, degradation, and other ecclesiastical censures, not extending to death, in such sort, and no other, as they might have done before the making of this act. s. 2.

As they might have done before the making of this act] Upon the abrogating of all the ancient statutes made against hereticks, the cognizance of heresy and punishment of hereticks returned into its ancient channel and bounds; and now belongs to the archbishop, as metropolitan of the province, and to every bishop within his own proper diocese, who are to punish only by ecclesiastical censures. And so (saith lord Coke) it was put in ure in all queen Elizabeth's reign; and so it was resolved by the chief justice, chief baron, and two other of the judges upon consultation in the 9 *Ja.* in the case of *Legate* the heretick. *Gibf.* 353. (u)

But as no person can be indicted or impeached for heresy before any temporal judge, or other that hath temporal jurisdiction; so if a heretick be convicted of heresy, and recant, he may not be punished by the ecclesiastical law: as we resolved in the 9 *Ja.* in the case of *Nicholas Fuller*. *Gibf.* 353. (x)

(u) 2 *Brownl.* 41. 3 *Inst.* c. 5. of heresy, 12 *Rep.* 93:

(x) 12 *Rep.* 44.

Heriot.

HER IOT, in the saxon *heregeat*, from *here*, an army, and *geat*, a march or expedition; was first paid in arms and horses, to the lord of the fee. It was the practice also to have a heriot paid to the parish priest; which was commonly the best, or second best horse of the deceased, led before the corps, and delivered at the place of sepulture. *Dalr. Feud. 54. Ken. Par. Ant. Gloss. (y)*

And this was in the name of a mortuary or corse present: and so it was enjoined by a constitution of archbishop *Winchelsea*, that if a person at the time of his death had two or more quick goods, the first best should be given to him to whom it was due (that is, to the lord of the fee); and the second best should be reserved to the church where the deceased person received the sacraments whilst he lived. *Lind. 184.*

Holidays.

1. **BY** the 5 & 6 Ed. c. 3. *Forasmuch as at all times men be not so mindful to laud and praise God, so ready to resort and hear God's holy word, and to come to the holy communion, and other laudable rites which are to be observed in every christian congregation, as their bounden duty doth require; therefore to call men to remembrance of their duty and to help their infirmity, it hath been wholejome provided, that there should be some certain times and days appointed, wherein the christians should cease from all other kind of labours, and should apply themselves only and wholly unto the aforesaid holy works, properly pertaining unto true religion; the which times and days specially appointed for the same are called holidays, not for the matter or nature either of the time or day, nor for any of the saints sake whose memories are had on those days (for so all days and times considered are God's creatures, and all of like holiness) but for the nature and condition of those godly and holy works wherewith only God is to be honoured, and the congregation to be edified, whereunto such times and*

days are sanctified and hallowed, that is to say, separated from all profane uses, and dedicated and appointed not unto any saint or creature, but only unto God and his true worship; neither is it to be thought, that there is any certain time or definite number of days prescribed in holy scripture, but that the appointment both of the time, and also of the number of days, is left by the authority of God's word to the liberty of Christ's church, to be determined and assigned orderly in every country, by the discretion of the rulers and ministers thereof as they shall judge most expedient to the true setting forth of God's glory, and the edification of their people: it is therefore enacted, that all the days hereafter mentioned shall be kept and commanded to be kept holidays, and none other; that is to say, all Sundays in the year, the days of the feast of the circumcision of our Lord Jesus Christ, of the epiphany, of the purification of the blessed virgin, of St. Matthias the apostle, of the annunciation of the blessed virgin, of St. Mark the evangelist, of St. Philip and Jacob the apostles, of the ascension of our Lord Jesus Christ, of the nativity of St. John Baptist, of St. Peter the apostle, of St. James the apostle, of St. Bartholomew the apostle, of St. Matthew the apostle, of St. Michael the archangel, of St. Luke the evangelist, of St. Simon and Jude the apostles, of all saints, of St. Andrew the apostle, of St. Thomas the apostle, of the nativity of our Lord, of St. Stephen the martyr, of St. John the evangelist, of the holy innocents, monday and tuesday in easter week, and monday and tuesday in whitun week; and that none other day shall be kept and commanded to be kept holy, or to abstain from lawful bodily labour. f. 1.

And it shall be lawful to all archbishops and bishops in their dioceses, and to all other having ecclesiastical or spiritual jurisdiction, to enquire of every person that shall offend in the premises, and to punish every such offender by the censures of the church, and to enjoin them such penance as the spiritual judge by his discretion shall think meet and convenient. f. 3.

Provided, that it shall be lawful for every husbandman, labourer, fisherman, and every other person of what estate, degree, or condition he be, upon the holidays aforesaid, in harvest, or at any other time in the year when necessity shall require, to labour, ride, fish, or work any kind of work, at their free wills and pleasure. f. 6.

Provided, that it shall be lawful to the knights of the right honourable order of the garter, to keep and celebrate solemnly the feast of their order, commonly called St. George's feast, yearly on the 22d, 23d, and 24th days of April and at such

other times as yearly shall be thought convenient by the king and the said knights of the said honourable order. s. 7.

This act was repealed in the first year of queen Mary; and in the first of queen Elizabeth a bill to revive the same was brought into parliament, but passed not; so that the repeal of queen Mary remained upon this act till the first year of king James the first, when this repeal was taken off. In the mean while, the kalendar before the book of common prayer had directed what holidays should be observed; and in the articles published by queen Elizabeth in the seventh year of her reign, one was, that there be none other holidays observed, besides the sundays, but only such as be set out for holidays as in the said statute of the 5 & 6 Ed. 6. and in the new kalendar authorized by the queen's majesty: who appears in other instances (as she did probably in this) to have greatly disliked the parliament's intermeddling in matters of religion, the ordering of which she reckoned one great branch of the royal supremacy. *Gibf.* 245.

Feasts.

2. Rubrick before the common prayer. *A table of all the feasts that are to be observed in the church of England throughout the year:—All sundays in the year, the circumcision of our Lord Jesus Christ, the epiphany, the conversion of St. Paul, the purification of the blessed virgin, St. Matthias the apostle, the annunciation of the blessed virgin, St. Mark the evangelist, St. Philip and St. James the apostles, the ascension of our Lord Jesus Christ, St. Barnabas, the nativity of St. John the Baptist, St. Peter the apostle, St. James the apostle, St. Bartholomew the apostle, St. Matthew the apostle, St. Michael and all angels, St. Luke the evangelist, St. Simon and St. Jude the apostles, all saints, St. Andrew the apostle, St. Thomas the apostle, the nativity of our Lord, St. Stephen the martyr, St. John the evangelist, the holy innocents, monday and tuesday in easter week, monday and tuesday in whitsun week.*

In this table it is observable, that all the same days are repeated as *feasts*, which were enacted to be *holidays* by the aforesaid statute: and also these two are added, viz. the *conversion of St. Paul*, and *St. Barnabas*, which perhaps were omitted out of the statute, because St. Paul and St. Barnabas were not accounted of the number of the twelve. But in the rubrick which prescribeth the lessons proper for *holidays*, those two festivals are specified under the denomination also of *holidays*. But their *eves* are not appointed by the kalendar, as the *eves* of the others are, to be fasting days.

3. By Can. 72. No minister shall, without the licence ^{Fasting days.} and direction of the bishop under hand and seal, appoint or keep any solemn fasts, either publickly, or in any private houses, other than such as by law are, or by publick authority shall be appointed, nor shall be wittingly present at any of them; under pain of suspension for the first fault, of excommunication for the second, and of deposition from the ministry for the third.

— By the 2 & 3 Ed. 6. c. 19. *Albeit the king's subjects now having a more perfect and clear light of the gospel and true word of God, through the infinite mercy and clemency of almighty God, by the hands of the king's majesty, and his most noble father of famous memory, and thereby perceiving that one day or one kind of meat of it self is not more holy, more pure, or more clean than another; yet forasmuch as divers of the king's subjects, turning their knowledge herein to satisfy their sensuality, have of late times more than in times past broken and contemned such abstinence which hath been used in this realm, upon the fridays, and saturdays, the embring days, and other days commonly called vigils, and in lent, and other accustomed times: the king's majesty, considering that due and godly abstinence is a mean to virtue, and considering also specially that fishers and men using the trade of living by fishing in the sea may thereby the rather be set on work, and that by eating of fish much fish shall be saved and increased; and also for divers other considerations and commodities of this realm, doth ordain and enact with the assent of the lords spiritual and temporal and the commons in this present parliament assembled, that all manner of statutes, laws, constitutions and usages, concerning any manner of fasting or abstinence from any kinds of meats, heretofore in this realm made or used, shall lose their force and strength, and be void and of none effect.* l. 1.

And also that no person shall willingly and wittingly eat any manner of fish upon any friday or saturday, or the embring days, or in lent, nor at any other day commonly reputed as a fish day, wherein it hath been commonly used to eat fish and not flesh; on pain of 10s for the first offence, and imprisonment for ten days, and during the time of his imprisonment to abstain from eating any manner of flesh; for the second offence 20s, and imprisonment twenty days, and during the time of his imprisonment to abstain from eating any manner of fish: and so like pain and imprisonment, as often as he shall afterwards offend. l. 2, 3.

And the justices of gaol delivery, and of the peace, shall have power to inquire of, hear, and determine the same; as in

cases of trespass, or other offence against the peace: Half of which forfeitures shall be to the king, and be esteemed into the exchequer, as other fines for any trespass or other offence against the peace; and half to him that will sue in any of the king's courts of record. §. 4.

Provided, that this statute shall not extend to any person that hath obtained any licence of the king; nor to any person being in great age, and in debility and weakness thereby; nor to any person being sick or notably hurt, without fraud or covin, during the time of his sickness; nor to any woman being with child, or lying in child-bed, for eating of such one kind of flesh as she shall have great lust unto; nor to any person being in prison for any other offence than against this act; nor to any that shall be the king's lieutenant, deputy or captain of any of his majesty's army hold or fortress, but the same themselves may eat flesh, and license their soldiers to do the same, in time prohibited, upon the want and lack of other kind of victuals; nor to St. Lawrence even, St. Mark's day, or any other day or even being abrogate; neither to any such as heretofore have obtained any licence in due form of the archbishop of Canterbury. §. 5.

And all archbishops, bishops, archdeacons, and their officers shall have power to enquire of offenders in the premises: and present the same to such, from time to time, as by virtue of this act have authority to hear and determine the same. §. 6.

Provided, that no person be molested on this act except he be accused, convicted, or indicted, within three months after the offence committed. §. 7.

By the 5 & 6. Ed. 6. c. 3. Every even or day next going before any of the aforesaid days of the feasts of the nativity of our Lord, of Easter, of the ascension of our Lord, pentecost, and the purification, and the annunciation of the aforesaid blessed virgin, of all joints, and of all the said feasts of the apostles other than of St. John the evangelist, and Philip and Jacob) shall be fasted, and commanded to be kept and observed; and none other even or day shall be commanded to be fasted. §. 2.

And it shall be lawful to all archbishops and bishops in their dioceses, and to all other having ecclesiastical or spiritual jurisdiction, to inquire of every person that shall offend in the premises, and to punish every such offender by the censures of the church, and to enjoin them such penance as the spiritual judge by his discretion shall think meet and convenient. §. 3.

Provided, that this act shall not extend to abrogate or take away the abstinence from flesh in Lent, or on Fridays and Saturdays, or any other day which is already appointed so to be kept, by virtue of the aforesaid act of the 2 & 3 Ed. 6. c. 19.
saving

saving only of those evens or days whereof the holiday next following is abrogated by this statute. s. 4.

And provided, that when any of the said feasts (the evens whereof be by this statute commanded to be observed and kept fasting days) do fall upon the monday; then the saturday next before, and not the sunday, shall be commanded to be fasted for the even of any such feast or holiday. s. 3.

Other than of St. John the evangelist, and of Philip and Jacob] The one of which falleth within the christmas holidays; and the other within the paschal solemnity, betwixt easter and whitsuntide. Gibf. 252.

By the rubrick, the tables of vigils and fasts and days of abstinence to be observed in the year, is as followeth (which altho' not in words, yet in substance is the same, with what is above expressed in the aforesaid statute;) viz. *the evens or vigils before the nativity of our Lord, the purification of the blessed virgin Mary, the annunciation of the blessed virgin, easter day, ascension day, pentecost, St. Matthias, St. John Baptist, St. Peter, St. James, St. Bartholomew, St. Matthew, St. Simon and St. Jude, St. Andrew, St. Thomas, all saints. And if any of these feasts fall upon a monday then the vigil or fast day shall be kept upon the saturday, and not upon the sunday, next before it.*

Vigils] Vigil was so called a vigiliis, because thereupon people were not only to fast, but to watch or wake by night, and pray. Gibf. 252.

And by the rubrick aforesaid, the days of fasting or abstinence are as followeth: 1. *The forty days of lent.* 2. *The ember days, at the four seasons; being the wednesday, friday, and saturday, after the first sunday in lent, the feast of pentecost, September the fourteenth, and December the thirteenth.* 3. *The three rogation days; being the monday, tuesday, and wednesday, before holy thursday or the ascension of our Lord* 4. *All the fridays in the year, except christmas day.*

*The ember days] Ember days were fasts observed in the church very early; and particularly by the church of England in the Saxon times, who called them ymbryne dagas, from whence (and not from embers, or from the greek ημεραι, as some have conjectured) our name of ember days is to be derived. The Saxon embryne (says Dr. Marshall) signifies a circle, a circuit, or course; and therefore they may be not improperly called the circular fasts, or fasts in course, being observed in the four seasons on which the circle of the year turns, and accordingly called by the canonists *junia quatuor temporum*, or fasts of the four quarters of the year. Gibf. 252.*

Rogation

Rogation days] Dr. Grey says, the rogation days were so called; from the extraordinary prayers and supplications which, with fasting, were at this time offered to God by devout christians. *Grey Abr. Cod.* 101.

But Dr. Godolphin says, the rogation days had their name, from certain rules or ordinances for abstinence or days of fasting, which the bishop of Rome recommended to be observed by the western churches, before that he assumed the power of compulsion; and which therefore he called by the gentle name of *rogation*: and thence the week of abstinence, a little before the feast of pentecost, was called the rogation week, the time of abstinence being appointed at the beginning by that ordinance which was called *rogatio*, and not *lex*, *decretum*, *statutum*, or the like. *God.* 129.

By the 5 El. c. 5. intituled, An act touching political constitutions for the maintenance of the navy; *For the maintenance of the navy, and for the sparing and increase of flesh viſtual, it shall not be lawful to any person to eat any flesh upon any days now usually observed as fish days; on pain of [20s, or one month's close imprisonment without bail, 35 El. c. 7. s. 22.] s. 15.*

And every person within whose house such offence shall be done, and being privy or knowing thereof, and not effectually publishing or disclosing the same to some publick officer having authority to punish the same; shall forfeit [13 s 4d. 35 El. c. 7. s. 22.] s. 16.

All which forfeitures for not abstaining from meats, shall be one third to the queen, one third to the informer, and one third to the common use of the parish where the offence shall be committed; and to be levied by the churchwardens after conviction in that behalf. s. 16.

Provided that nothing in this act contained, concerning the eating of flesh, shall extend to any person that hereafter shall have any special licence, upon causes to be contained in the same licence, and to be granted according to the laws of this realm in such cases provided. s. 17.

All and every of which licences shall be void, unless they contain these conditions; viz. every licence made to any person being of the degree of a lord of parliament, or of their wives, shall be upon condition, that every such person so to be licensed, shall pay to the poor mens box, within the parish where they dwell, on the feast of the purification or within six days after, 26 s 8d; the same to be paid within one month next after the same feast, on pain of forfeiting the licence; and every licence to any person of the degree of a knight, or a knight's wife, shall be upon condition,

condition, that every such person so licensed shall pay yearly 13 s 4 d as aforesaid: and every licence to any person under the degrees aforesaid, shall be upon condition, that every person so licensed shall pay yearly 6 s 8 d as aforesaid. §. 18.

Provided, that no licence shall extend to the eating of any beef, at any time of the year; nor to the eating of any veal in any year, from the feast of St. Michael, unto the first day of May. §. 19.

Provided, that all persons which by reason of notorious sickness shall be enforced, for recovery of health, to eat flesh for the time of their sickness, shall be sufficiently licensed by the bishop of the diocese; or by the parson, vicar, or curate of the parish where such person shall be sick, or of one of the next parish adjoining, if the said parson, vicar, or curate of his own parish be wilful, or if there be no curate within the same parish: which licence shall be made in writing, and signed by such bishop, parson, vicar or curate, and not endure longer than the time of the sickness; and if the sickness continue above eight days after such licence granted, then the licence shall be registered in the church book, with the knowledge of one of the churchwardens; and the party licensed, shall give to the curate 4 d for the entry thereof; and that licence to endure no longer but only for the time of his sickness. §. 20.

And if any licence by any parson, vicar, or curate be granted to any person, other than such as evidently appear to have need thereof by reason of their sickness: not only every such licence shall be void, but also every such parson, vicar or curate shall forfeit for every such licence otherwise granted, five marks. §. 21.

Provided, that all such persons as heretofore were or ought to be licensed, by reason of age or other impairment or cause, by order of the ecclesiastical laws, shall enjoy the same privilege and accustomed licences. §. 23.

And justices of the peace in their sessions, and mayors and other head officers in cities and towns corporate in their sessions or other courts, shall have power to inquire of offenders against this act, as well by the oaths of twelve men, as otherwise by information; and thereupon to hear and determine the same. §. 30.

And they may make process against the offenders, as upon indictment of trespass. §. 31.

And for levying the forfeitures, the said justices mayors or other head officers shall have power to make such process, as they shall think good by their discretions. §. 34.

But no information at the suit of any person concerning this act, shall be of any effect to put any person to answer, ex-
cent

Holidays.

cept the same be within half a year after the offence done; and no information or presentment for the queen, shall be of any effect to put any person to answer, except the same be within one year after the offence done. §. 35.

Provided, that such persons as shall have, upon good and just consideration, any lawful licence to eat flesh upon any fish day (except such persons as for sickness shall for the time be licensed by the bishop of the diocese, or by their curates, or shall be licensed by reason of age or (other impediment allowed heretofore by the ecclesiastical laws of this realm); shall be bound by force of this statute to have for every one dish of flesh served to be eaten at their table, one usual dish of sea fish fresh or salt, to be likewise served at the same table, and to be eaten or spent without fraud or covin, as the like kind is or shall be usually eaten or spent on saturdays. §. 37.

And this article to be taken and interpreted in the favour of expence of sea fish; and the offender to be punished in like manner as is ordered by this statute for punishment of such as shall eat flesh upon fridays, saturdays, or other fish days. §. 38.

And because no manner of person shall misjudge of the intent of this statute, limiting orders to eat fish, and to forbear eating of flesh, but that the same is purposely intended and meant positively for the increase of fishermen and mariners, and repairing of port towns and navigation, and not for any superstition to be maintained in the choice of meats: it is enacted, that whosoever shall by preaching, teaching, writing, or open speech certify, that any eating of fish, or forbearing of flesh, mentioned in this statute, is of any necessity for the saving of the soul of man, or that it is the service of God, otherwise than as other politick laws are and be; that then such persons shall be punished as spreaders of false news are and ought to be. §. 39, 40.

And by the 27 El. c. 11. §. 4. To the intent that the fridays, saturdays, and days appointed by former laws to be fish days, may the better be observed, for the utterance and expence of fish, and for the sparing of flesh; no innholder, taverner, alehousekeeper, common victualler, common cook, or common table keeper, shall utter or put to sale, or cause to be uttered or put to sale, on the said days, not being christmas day, or upon any day in the time of Lent, any kind of victuals except it be to such persons resorting to his house as shall have lawful licence to eat the same, (according to the tenor of the 5 El. c. 5.); on pain of 5 l. and ten days imprisonment without bail, one third to the queen, one third to the lord of the lent where the offence shall be committed, and one third to him that shall sue in any of her majesty's courts of record: and the said offences, by virtue of this statute, shall be inquired of heard and determined, in manner

manner and form as is expressed for the offences contained in the said statute of the 5 El.

Lord Coke says, before these acts the eating of flesh on Fridays was punishable in the ecclesiastical court; as yet it is, the jurisdiction being saved by the said acts. 3 Inst. 200.

4. Rubrick after the nicene creed: *the curate shall then declare to the people, what holidays or fasting days are in the week following to be observed.* Repairing to church on holidays.

Can. 64. Every parson vicar or curate shall in his several charge declare to the people every Sunday, at the time appointed in the communion book, whether there be any holidays or fasting days the week following. And if any do hereafter wittingly offend herein, and being once admonished thereof by his ordinary, shall again omit that duty; let him be censured according to law, until he submit himself to the due performance of it.

Can. 13. All manner of persons within the church of England shall from henceforth celebrate and keep the Lord's day commonly called Sunday, and other holidays, according to God's will and pleasure and the orders of the church of England prescribed on that behalf; that is, in hearing the word of God read and taught, in private and publick prayers, in acknowledging their offences to God and amendment of the same, in reconciling themselves charitably to their neighbours where displeasure hath been, in oftentimes receiving the communion of the body and blood of Christ, in visiting of the poor and sick, using all godly and sober conversation.

Can. 14. The common prayer shall be said or sung, distinctly and reverently, upon such days as are appointed to be kept holy by the book of common prayer, and their eyes.

By the 1 El. c. 2. *Every person shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour themselves to resort to their parish church or chapel accustomed, or upon reasonable let thereof, to some usual place where common prayer and such service of God shall be used in such time of let, upon every Sunday and other days ordained and used to be kept as holidays, and then and there to abide orderly and soberly, during the time of the common prayer, preaching, or other service of God there to be used and ministered: on pain of punishment by the censures of the church, and also upon pain that every person so offending shall forfeit for every such offence 12 d. to be levied by the churchwardens of the parish where such offence shall be done, to the use of the poor of the same parish,*

rich, of the goods lands and tenements of such offender, by way of distress. l. 14.

Provided, that whatsoever persons offending in the premises, shall for their offences first receive punishment of the ordinary, having a testimonial thereof under the ordinary's seal, shall not for the same offence afterwards be convicted before the justices; and likewise receiving for the said offence punishment first by the justices, shall not for the same offence afterwards receive punishment of the ordinary. l. 24.

And the justices of assize may hear and determine the same, and make process for execution as they may do in cases of trespass. l. 17.

Or the same may be determined by one justice of the peace; to whom it shall be lawful, on proof to him made of such default by confession or oath of witness, to call the party before him: and if he shall not make a sufficient excuse, and due proof thereof to the satisfaction of the said justice, he shall give warrant to the churchwardens of the parish where the party shall dwell, to levy 12d for every such default by distress and sale; and in default of such distress, shall commit him to prison till payment be made: which forfeiture shall be applied to the use of the poor of that parish wherein the offender shall dwell at the time of the offence committed. 3 J. c. 4. l. 27. Provided, that prosecution be within one month. l. 28.

But this shall not extend to qualified protestant dissenters, who repair to some place of religious worship allowed by the toleration act. 1 W. c. 18.

Fairs prohibited
on certain holi-
days.

5. By the 27 H 6. c. 5. Considering the abominable injuries and offences done to almighty God, and to his saints, always saiders and singular assisters in our necessities, because of fairs and markets upon their high and principal feasts, as in the feast of the ascension of our Lord, in the day of corpus christi, in the high feast of the assumption of our blessed lady, the day of all saints, and on good friday, accustomedly and miserably holden and used in the realm of England; in which principal and festival days, for great earthly covetise, the people is more willingly vexed, and in bodily labour foiled, than in other several days, as in fastening and making their booths and stalls, bearing and carrying, lifting and placing their wares outward and homeward, as tho' they did nothing remember the horrible defiling of their souls in buying and selling, with many deceitful lies and false perjury, with drunkenness and strifes, and so specially withdrawing themselves and their servants from divine service; it is ordained, that all manner of fairs and markets in the said principal feasts and good friday shall clearly cease from all shewing of any goods or merchandises (necessary victual only except),

upon pain of forfeiture of all the goods aforesaid so shewed, to the lord of the franchise or liberty, where such goods, contrary to this ordinance be or shall be shewed. Nevertheless the king of his special grace by authority of the parliament granteth to them power, which of old time had no day to hold their fair or market, but only upon the festival days aforesaid, to hold by the same authority and strength of his old grant, within three days next before the said feasts, or next after; proclamation first made to the simple common people, upon which day the aforesaid fair shall be holden, always to be certified without any fine or fee to be taken to the king's use. And they which of old time have by special grant, sufficient days before the feast aforesaid, or after, shall in like manner, as is aforesaid, hold their fairs and markets, the full number of their days; the said festival days, and goodfridays, (and sundays) except.

[5. By the 13 G. 3. c. 80. certain penalties are inflicted on persons wilfully killing game, or using a dog, gun, net, or engine on a Sunday or Christmas day: for which see *Killing game on sundays and Christmas day.*
St. John's day.]

6. Besides the occasional fast days, in time of war, or other calamity; and days of thanksgiving for peace, or victory, or other blessing: there are four solemn days annually, for which special services are appointed: to wit, the fifth day of November, being the day of the papists conspiracy, and of the arrival of king William: the thirtieth day of January, being the day of the martyrdom of king Charles the first: the nine and twentieth day of May, being the day of the restoration of king Charles the second; and the twenty-fifth day of October, being the day on which his majesty began his happy reign. *Occasional offices.*

7. By the 3 J. c. 1. Forasmuch as almighty God hath in all ages shewed his power and mercy in the miraculous and glorious deliverance of his church, and in the protection of religious kings and states; and that no nation of the earth hath been blessed with greater benefits than this kingdom now enjoyeth, having the true and free profession of the gospel under our most gracious sovereign lord king James, the most great, learned, and religious king that ever reigned therein, enriched with the most bountiful and plentiful progeny, proceeding out of his royal loins, promising continuance of this happiness and profession to all posterity: the which many malignant and devilish papists, jesuits, and seminary priests much envying and fearing, conspired most horribly, when the king's most excellent majesty, the queen, the prince, and all the lords spiritual and temporal, and commons should have assembled in the upper house of parliament, upon the fifth day of November, in the year of our Lord one thousand six hundred and eighty-eight, to have celebrated the anniversary of the day of the deliverance of this kingdom from the yoke of popery, by the death of king James the first, and the accession of his daughter Mary the second, to the throne of Great Britain. *For the fifth of November.*

Holidays.

six hundred and five, suddenly to have blown up the said whole house with gunpowder: an invention so inhuman, barbarous, and cruel as the like was never before heard of, and was (as some of the principal conspirators thereof confess) purposely devised and concluded to be done in the said house, that where sundry necessary and religious laws for preservation of the church and state were made, which they falsely and slanderously term cruel laws, enacted against them and their religion, both place and persons should all be destroyed and blown up at once; which would have turned to the utter ruin of this whole kingdom, had it not pleased almighty God, by inspiring the king's most excellent majesty with a divine spirit, to interpret some dark phrases of a letter shewed to his majesty, above and beyond all ordinary construction, thereby miraculously discovering this hidden treason not many hours before the appointed time for the execution thereof: therefore the king's most excellent majesty, the lords spiritual and temporal, and all his majesty's faithful and loving subjects, do most justly acknowledge this great and infinite blessing to have proceeded merely from God his great mercy, and to his most holy name do ascribe all honour glory and praise: and to the end this unfeigned thankfulness may never be forgotten, but be had in a perpetual remembrance, that all ages to come may yield praises to his divine majesty for the same, and have in memory this joyful day of deliverance. s. 1.

It is enacted, that all and singular ministers in every cathedral and parish church, or other usual place for common prayer, shall always upon the fifth day of November, say morning prayer, and give unto almighty God thanks for this most happy deliverance; and all persons shall always upon that day, diligently and faithfully resort to the parish church or chapel accustomed, or to some usual church or chapel where the said morning prayer, preaching or other service of God shall be used, and then and there to abide orderly and soberly, during the time of the said prayers, preaching, or other service of God, there to be used and ministered. s. 2.

And that every person may be put in mind of his duty, and be then better prepared to the said holy service; every minister shall give warning to his parishioners, publicly in the church; at morning prayer, the Sunday before every such fifth day of November, for the due observation of the said day. s. 3.

And after morning prayer, or preaching upon the said fifth day of November; they shall read publicly, distinctly, and plainly, this present act. Id.

Give unto Almighty God thanks] It should seem by the tenor of this act, that the form or manner of giving thanks was left to the discretion of every minister: but that

that there was a standing form for this day, in the 16 C. 1. appears from this order of the house of lords; "Ordered, that the title before the prayers for the deliverance from the gunpowder plot shall be altered and printed hereafter *in hæc verba*, viz. A thanksgiving for the delivery from the gunpowder treason: and the printer is to be sent for to appear before the house, to be asked how this title that is now prefixed, viz. A thanksgiving for peace and victory, came to be introduced." *Gibf.* 249.

This office was revised by the convocation, in the year 1662; and afterwards some few additions and alterations were made, upon a new revival in the second year of William and Mary; and so continueth. *Gibf.* 249.

And the title thereof is this: *A form of prayer with thanksgiving, to be used yearly upon the fifth day of November; for the happy deliverance of king James the first, and the three estates of England, from the most traitorous and bloody intended massacre by gunpowder; and also for the happy arrival of his majesty king William on this day, for the deliverance of our church and nation.*

And altho' the due observation of this day, as also of the thirtieth of January, and the twenty-ninth of May, are enjoined by act of parliament; yet the particular forms to be used on those days, are not previously directed, nor subsequently confirmed by any act of parliament; but they are specially authorized (as is also that of the king's inauguration) by this order of his majesty:

" GEORGE R.

" Our will and pleasure is, that these four forms of prayer, made for the fifth of November, the thirtieth of January, the twenty-ninth of May, and the twenty-fifth of October, be forthwith printed and published, and annexed to the book of common prayer and liturgy of the church of England, to be used yearly on the said days, in all cathedral and collegiate churches and chapels, in all chapels of colleges, and halls within both our universities; and of all our colleges of Eaton and Winchester, and in all parish churches and chapels, within that part of our kingdom of Great Britain called England, the dominion of Wales, and town of Berwick upon Tweed. Given at our court at St. James's, the seventh day of October, 1761, in the first year of our reign.

" By his majesty's command;

" B U T E."

Dr. Watson questioneth (and justly as it seemeth) the ordinary's power, to punish for the neglect of keeping the solemn days, enjoined by act of parliament; because the respective acts do give to the ordinary no such power. *Watf. c. 32.*

But there seemeth to be no doubt, so far as the several offences shall fall within the words of the said acts, but that the offenders may be thereupon indicted, fined, and imprisoned for the contempt.

For the thirtieth
of January.

8. By the 12 C. 2. c. 30. it is enacted, by the lords and commons assembled in parliament; that *every thirtieth day of January, unless it falls out to be upon the Lord's day, and then the next day following, shall be for ever set apart, to be kept and observed in all churches and chapels, as an anniversary day of fasting and humiliation, to implore the mercy of God, that neither the guilt of the sacred and innocent blood of his late majesty king Charles the first, nor those other sins by which God was provoked to deliver up both us and our king into the hands of cruel and unreasonable men, may at any time be visited upon us or our posterity.*

The form of prayer for this solemnity, and also for that of the 29th of May, were of a different complexion in the reign of king Charles the second from what they are now. Of which, the reason is said to have been this: the parliament and other leading men who called home king Charles the second (many of whom had been concerned in opposing his father's measures) would not be called traitors; and required that a distinction should be made between the commencement of the war, and the conclusion of it: they would not suffer the first opposition made to the measures of that unhappy prince to be stiled rebellion; notwithstanding that they disapproved of the abolition of the regal government which ensued.

And accordingly the offices for these two solemnities were drawn up, without any reflection on the first authors or promoters of the opposition; and, in general, breathe more a spirit of piety than of party, of humiliation than of revenge; and, throughout, are modest, grave, decent, sensible and devout.

King James the second altered these forms. And king William did not venture to reduce them to their primitive state. And so they have continued, with very little variation, to this day.

On the twenty-
th of May.

9. By the 12 C. 2. c. 14. *Forasmuch as almighty God the King of kings, and sole disposer of all earthly crowns and kingdoms, hath by his all-swaying providence and power miracu-*
lously

lously demonstrated in the view of all the world, his transcendent mercy love and graciousness, towards his most excellent majesty Charles the second, by his especial grace, of England, Scotland, France and Ireland, king, defender of the true faith, and all his majesty's loyal subjects of this his kingdom of England, and the dominions thereunto annexed by his majesty's late most wonderful glorious peaceable and joyful restoration, to the actual possession and exercise of his unaoubted hereditary sovereign and regal authority over them (after sundry years forced extermination into foreign parts, by the most traiterous conspiracies, and armed power of usurping tyrants, and execrable perfidious traitors) and that without the least opposition or effusion of blood, through the unanimous cordial loyal votes of the lords and commons in this present parliament assembled, and passionate desires of all other his majesty's subjects; which unexpressible blessing (by God's own most wonderful dispensation) was compleated on the twenty-ninth day of May last past, being the most memorable birth-day, not only of his majesty both as a man and prince, but likewise as an actual king, of this and other his majesty's kingdoms, all in a great measure new-born and raised from the dead on this most joyful day, wherein many thousands of the nobility, gentry, citizens, and other his lieges of this realm, conducted his majesty unto his royal cities of London and Westminster, with all possible expressions of their publick joy and loyal affections, in far greater triumph than any of his most victorious predecessors kings of England returned thither from their foreign conquests; and both his majesty's house of parliament, with all dutiful and joyful demonstrations of their allegiance, publicly received, and cordially congratulated his majesty's most happy arrival, and investiture in his royal throne; at his palace at Whitehall: Upon all which considerations, this being the day which the Lord himself hath made and crowned with so many publick blessings and signal deliverances, both of his majesty and his people, from all their late most deplorable confusions, divisions, wars, devastations and oppressions, to the end that it may be kept in perpetual remembrance in all ages to come, and that his sacred majesty with all his subjects of this realm and the dominions thereof, and their posterities after them, might annually celebrate the perpetual memory thereof, by sacrificing their unfeigned hearty publick thanks thereon to almighty God, with one heart and voice, in a most devout and christian manner, for all these publick benefits received and conferred on them, upon this most joyful day; it is enacted, by the king's most excellent majesty, and the lords and commons in parliament assembled, that all and singular ministers of God's word and sacraments, in every church, chapel, and other usual

place of divine service and publick prayer, which now are, or hereafter shall be within this realm of England and the dominions thereof, and their successors, shall in all succeeding ages annually celebrate the twenty-ninth day of May, by rendering their hearty publick praises and thanksgivings unto almighty God; for all the fore-mentioned extraordinary mercies, blessings, and deliverances received, and mighty acts done thereon, and declare the same to all the people there assembled, and the generations yet to come, that so they may for ever praise the Lord for the same, whose name alone is excellent, and his glory above the earth and heavens.

And be it further enacted, that every person inhabiting within this kingdom and the dominions thereunto belonging, shall upon the said day annually resort with diligence and devotion to some usual church, chapel, or place, where such publick thanksgiving and praises to God's most divine majesty shall be rendered, and there orderly and devoutly abide during the said publick thanksgivings, prayers, preaching, singing of psalms and other service of God there to be used and ministered.

And to the end that all persons may be put in mind of their duty thereon, and be the better prepared to discharge the same with that piety and devotion as becomes them; be it further enacted, that every minister shall give notice to his parishioners publicly in the church, at morning prayer the Lord's day next before every such twenty-ninth-day of May, for the due observation of the said day, and shall then likewise publicly and distinctly read this present act to the people.

Of the difference between the form of prayer which was first drawn up for this service, and used during the reign of king Charles the second, and the form which is now used, it is thought fit here to subjoin some striking specimens.

Office of Cha. 2.

Office of Ja. 2. (now in use)

Title thereof, and rubrick.

A form of prayer with thanksgiving, to be used yearly upon the 29th day of May; being the day of his majesty's birth, and happy return to his kingdoms.

A form of prayer with thanksgiving to almighty God, for having put an end to the great rebellion, by the restoration of the king and royal family, and the restoration of the government, after many years interruption: which unspeakable

able mercies were wonderfully completed upon the 29th of May, in the year 1660. And in memory thereof, that day in every year is by act of parliament appointed to be for ever kept holy.

The act of parliament for the observation of this day, shall be read publickly in all churches on the Lord's day next before ; and notice to be given for the due observation of the said day.

Collect.

... We yield thee praise and thanksgiving for our deliverance from those great and apparent dangers wherewith we were compassed.

... We yield thee praise and thanksgiving for the wonderful deliverance of these kingdoms from the great rebellion, and all the miseries and oppressions consequent thereupon, under which they had so long groaned.

... We yield thee thanks : for our deliverance ... from the unnatural rebellion, usurpation, and tyranny, of ungodly and cruel men.

Finally, by way of contrast, the spirit both of the one and the other will appear, from the following anecdotes.

Office of Cha. 2.

O God, who by thy divine providence and goodness didst this day first bring into the world, and didst this day also bring back and restore to us, and to his own just and undoubted rights, our most gracious sovereign lord thy servant king Charles ; preserve his life, and establish his throne, we beseech thee. Be unto him a helmet of salvation against the face of his enemies, and a strong tower of

Office of Ja. 2.

Almighty God, and heavenly Father, who of thine infinite and unspeakable goodness towards us, didst in a most extraordinary and wonderful manner disappoint and overthrow the wicked designs of those traiterous, heady, and highminded men, who under pretence of religion and thy most holy name, had contrived, and well nigh effected the utter destruction of this church and kingdom ; as we do this

of defence in the time of trouble. Let his reign be prosperous, and his days many. Let justice, truth, and holiness; let peace, and love, and all christian virtues flourish in his time. Let his people serve him with honour and obedience; and let him so duly serve thee on earth, that he may hereafter everlastingly reign with thee in heaven, through Jesus Christ our Lord. Amen.

O Lord our God, who upholdest and governest all things in heaven and earth; receive our humble prayers, with our thanksgivings, for our sovereign lord Charles, set over us by thy grace and providence to be our king: and so, together with him, bless the whole royal family with the dew of thy heavenly Spirit; that they, ever trusting in thy goodness, protected by thy power, and crowned with thy gracious and endless favour, may continue before thee in health, peace, joy, and honour, a long and happy life upon earth, and after death obtain everlasting life and glory in the kingdom of heaven; by the merits and mediation of Christ Jesus our Saviour, who with the Father and the Holy Spirit, liveth and reigneth ever one God, world without end. Amen.

day most heartily and devoutly adore and magnify thy glorious name for this thine infinite goodness already vouchsafed to us; so do we most humbly beseech thee to continue thy grace and favour towards us, that no such dismal calamity may ever again fall upon us. Infatuate and defeat all the secret councils of deceitful and wicked men against us. Abate their pride, assuage their malice, and confound their devices. Strengthen the hand of our now most gracious sovereign, and all that are put in authority, under him, with judgment and justice, to cut off all such workers of iniquity, as turn religion into rebellion, and faith into faction; that they may never again prevail against us, nor triumph in the ruin of the monarchy, and thy church among us. Protect and defend our sovereign lord the king, with the whole royal family, from all treasons and conspiracies. Be unto him an helmet of salvation, and a strong tower of defence against the face of all his enemies; clothe them with shame and confusion, but upon himself and his posterity let the crown for ever flourish. So we thy people, and the sheep of thy pasture, will give thee thanks for ever, and will always be shewing forth thy praise, from generation to generation, thro' Jesus Christ our only Saviour and Redeemer; to whom with thee, O Father, and the Holy Ghost, be glory in the church, throughout all ages, world without end. Amen.

Note, there is no order in either of these offices, for a sermon or homily on this day; and in the office of Cha.

Cha. 2. there is no direction for a sermon or homily on the 30th of January, but by the office of James 2d it is required that on the said 30th day of Jan. shall be read the first and second parts of the homily against disobedience and wilful rebellion, or else the minister shall preach a sermon of his own composing upon the same argument.

10. The inauguration day, or the day when the king ^{For the king's inauguration.} or queen, for the time being, began their respective reigns, is not enjoined by act of parliament, as are the other solemn days, for which particular services are appointed. The observation of this day, in the time of king Charles the first, was enforced by a particular canon in the year 1640, after the example (as it is said in the preface to that canon) as well of the godly christian emperors in the former times, as of our own most religious princes since the reformation: and the said preface further saith, that a particular form of prayer was appointed by authority for that day and purpose, and injoineth all churchwardens to provide two of those books at least. This festival was disused in the reign of king Charles the second, upon occasion of the death of his royal father, the manner of which changed the day into a day of sorrow and fasting, as is set forth in the order for reviving that usage in the first year of king James the second, before the service composed for that purpose. Which service (after another disuse of that festival during the reign of king William) was revised, and the observation of the day commanded by a special order thereunto annexed, in the second year of queen Anne, and so continueth to this time. *Gibf. 246.*

Some have questioned by what authority of law this solemnity, as also the other occasional thanksgivings and fasts appointed by the king are kept. Upon which Mr. *Johnson* observeth, that it is sufficient in this case (as he thinketh) that the two houses of parliament have and do own this power to be lodged in the crown, as they do by submitting to these royal commands in observing such days, and sometimes petitioning him to order these religious solemnities. *Johnf. Cler. Vad. Msc. 182.*

Nevertheless this same Mr. Johnson afterwards, in the year 1715, being cited before the ordinary to give an account why he omitted in his church the service of the king's inauguration, persisted in his omission thereof, and gave this for the reason (which he desired might be understood as well for his omission of the service of that day, as

of other occasional prayers at other times); namely, that the king's proclamation hath not the force of a law in England; that the king is supreme in ecclesiastical causes, only as he is so in temporal, that is, in his courts; and that he knoweth (he says) of no supremacy, which is exercised without either parliament, or convocation, or court of delegates, or the courts in Westminster-hall; or however, that the king's supremacy, whatever it is, in this respect is restrained and limited by act of parliament; that by the 36th canon every clergyman is required to promise under his hand, that he will use the form in the book of common prayer prescribed, *and no other*; that by the statute of the 5 & 6 Ed. 6. c. 3. all the days there mentioned shall be kept as holidays, *and none other*; and that by the several acts of uniformity, all ministers are required to use the form prescribed in the book of common prayer, *and none other, or otherwise*.—And the prosecution against him (he says) did not proceed. *Johnson's case* of occasional days and prayers.—This was in the year 1721, after the cause had rested for six years. But whether it was upon the occasion of Mr. Johnson's publishing this case, or for whatever other reason, it appears, that the prosecution did afterwards proceed. And in archbishop Wake's *Collectanea*, now belonging to the library of *Christ Church* in Oxford, (Canterbury. v. 4. art. 276.) there is a letter from Dr. Bower, archdeacon of Canterbury (who was then also bishop of Chichester) to archbishop Wake, proposing methods of bringing Mr. Johnson's cause to speedy issue; dated Oct. 25, 1723.

Then, Art. 277. follows a copy of Mr. Johnson's proxy; viz.

Whereas there has been a cause of office, &c. And whereas divers articles have been given in and admitted, to which the said Johnson had given a negative office—as by the act &c.—Now know all men by these presents, that I the said J. J. do acknowledge and confess myself sorry for having given offence in the matters contained in the said articles, and do hereby retract the negative issue given by me to them, and do confess the said articles in all and every part thereof, and submit myself in all things to the right reverend the archdeacon aforesaid, or his official; and do hereby sincerely promise not to offend in the like manner for the future: and being aged and infirm, and very unfit to travel from my said vicarage to Canterbury, but desirous that this my retraction of the negative issue given by me to the said articles, and
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my promise not to offend in the like manner for the future, may have their due effect; I do hereby constitute and appoint Mr. George Upton, one of the proctors of the said archdeacon's court, to be my lawful and undoubted proctor, for me, and in my name, to appear before the right reverend the archdeacon aforesaid, or his official, or surrogate, or any other competent judge in this behalf, to pray and procure this my retraction of the negative issue given by me to the said articles to be admitted, and to confess the same in all their parts, with a promise in my name not to offend in the like manner for the future; and submitting in all things to what the right reverend the archdeacon or his official shall do touching the premises; ratifying, allowing, and hereby confirming whatsoever my said proctor shall fully do or cause to be done herein. In witness whereof, I have hereunto set my hand and seal, this third day of March, 1723.

John Johnson.

Then follows,

6^{to} Martii 1723 Coram D^{no} Wile, &c.

Procurator hinc inde confesserunt in diem &c. Tunc Upton ext' procurium suum spiale sub manu et sigillo J. J. Clici partis suæ firmatum et vigore ejusdem retractavit responsa sua negativa aliis artis con' eundem J. J. extis facta et data et animo contestandi litem affirmative et eisdem agnovit omnes et singulos artos præd' in omni parte eorundem esse veros et nomine partis suæ submisit se Rdo Dno Epo Cicestr' Archiono Cant' ejusq' officiali cum promissione de non repetendo offensiones in articulis præd' objectas et homoi procurium retractionem confession' submission' et promission' admisit Quatus &c. in præsentia Norris eadem confessa oblata et acta per Upton acceptantis. Tunc dtus Upton petiit dtum J. J. partem suam dimitti dno Norris dissen' ad cujus petnem D^{aus} decrevit Monem contra dtum J. J. ad legend' et recitand' in Ecclesia sua paroli de Cranbrook Formulas præcum publicar' 29 Maii 1^o Augusti 5^{to} Novembris et 30 vel 31 Jan' legi et recitari authoritate Regia injunctas diebus respe præd' et ad certificand' D^{no} Archiono præd' ejusq' officiali aut alii Judici in hac parte competent' de obedientia

Hospitals.

obedientia sua in hac parte facta primo die Juridico post 30^m Januarii prox futur' et condemnavit dictum J. J. in expensis &c. et assignavit Procuribus hinc inde ad audiend' Voltem &c. super petnem dñi Upton et super taxation' earundem expensarum in prox^m &c. dño Upton diffen'.

Art. 292. Extract from a letter to archbishop Wake, in Mr. Johnson's own hand-writing.

Cranbrook. Lady-day, 1724.

May it please Your Grace,

To accept of my most humble thanks for Your Lenity, in the point of extraordinary days and occasional prayers. And I promise that I will never give You just occasion to repent of it.——

Homilies. See Public Worship.

Hospitals.

FOR Papists being disabled to nominate to hospitals, see title Popery.

Divers kinds of hospitals.

1. Of hospitals, some are corporations aggregate of many, as of master or warden, and his confreres; some, where the master or warden hath only the estate of inheritance in him, and the brethren or sisters power to consent, having college and common seal; some, where the master or warden hath only the estate in him, but hath no college and common seal. And of these hospitals some be eligible, some donative, and some presentable. 1 Inst. 342.

Power of foundation.

2. By the 39 Eliz. c. 5. (made perpetual by the 21 Jac. c. 1.) Every person seized of an estate in fee simple, shall have full power at his will and pleasure, by deed inrolled in the high court of chancery, to erect, found, and establish an hospital, maison de Dieu, abiding place, or house of correction, as well for the finding sustentation and relief of the maimed, poor, needy, or impotent people, as to set the poor to work; to have continuance for ever; and from time to time, to place therein such head and members, and such number of poor, as

as to him, his heirs, and assigns shall seem convenient: and such hospital so founded, shall be incorporated, and have perpetual succession for ever; by such name as the founder, his heirs, executors, or assigns shall appoint: and shall by the name of incorporation have capacity to purchase, and hold any goods or freehold lands, not exceeding 200 l a year above reprises; without licence or writ of ad quod damnum; the statute of mortmain, or any other statute or law to the contrary notwithstanding. And they shall have a common seal. Provided, that no such hospital shall be founded or incorporated, unless upon the foundation or erection thereof, the same be endowed for ever, with lands, tenements, or hereditaments, of the clear yearly value of 10 l. And, finally, such constructions shall be made of this act, as shall be most beneficial for the maintenance of the poor, and for repressing and avoiding of all acts and devices to be invented or put in ure contrary to the true meaning of this act.

Not exceeding 200 l a year] If they be at the time of the foundation or endowment of the yearly value of 200 l or under, and afterwards they become of greater value by good husbandry, rising of prices, sudden accidents, as by escheat, or otherwise; they shall continue good, to be enjoyed by the hospital, albeit they be above the yearly value of 200 l: for the yearly value must be accounted as it was at the time of the endowment made. Also goods and chattels (real or personal) they may take of what value soever. 2 Inst. 722.

But by the 9 G. 2. c. 36. No manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal; nor any sum of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out, or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given or any ways conveyed or settled (unless it be bona fide for full and valuable consideration) to or upon any person or persons, bodies politick or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered, in trust or for the benefit of any charitable uses whatsoever; unless such appointment of lands, or money, or other personal estate (other than stocks in the publick funds), be made by deed indented, sealed and delivered in the presence of two witnesses, twelve kalendar months at least before the death of the donor, and be enrolled in chancery within six kalendar months next after the execution thereof; and unless such stock in the publick funds, be transferred in the publick books usually kept for the transfer of stocks, six kalendar months at least before the death of the donor: and unless
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the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without power of revocation. And any assurance otherwise made shall be void (x).

Visitation and
government.

3. By the aforesaid statute of the 39 *Eliz. c. 5.* The hospitals, so founded, shall be ordered and visited by such person or persons, as shall be assigned by the founder, his heirs or assigns, in writing under his or their hand and seal, not being repugnant or contrary to the laws and statutes of this real (a).

If the founder maketh no appointment; then it is enacted by the 2 *H. 5. c. 1.* as followeth: forasmuch as many hospitals within this realm, founded as well by the noble kings of this realm, and lords, and ladies, both spiritual and temporal, as by divers other estates, to the honour of God and of his glorious mother, in aid and merit of the souls of the said founders, to the which hospitals the same founders have given a great part of their moveable goods for the building of the same, and a great part of their lands and tenements, therewith to sustain impotent men and women, lazars, men out of their wits, and poor women with child, and to nourish, relieve, and refresh other poor people in the same, — be now for the most part decayed, and the goods and profits of the same by divers persons as well spiritual as temporal withdrawn and spent in other use, whereby many men and women have died in great misery, for default of aid, living, and succour, to the displeasure of God, and peril of the souls of such manner of disposers; it is ordained and established, that as to the hospitals which be of the patronage and foundation of the king, the ordinaries, by virtue of the king's commission to them directed, shall inquire of the manner and foundation of the said hospitals, and of the governance and estate of the same, and of all other matters ne-

(x) See *Mortmain*. And note, that though lands purchased *bona fide* for full consideration are excepted out of this act; the king's licence is necessary to enable corporations to purchase and hold lands in mortmain. 7 & 8 *W. 3. c. 37.*

(a) If no such person be named, the visitatorial power, in eleemosynary lay foundations, is, by law, thrown upon the founder and his heirs, whom failing, it devolves upon the crown, to be exercised by the chancellor. See *College*, 6 & 7. and 4 *T. Rep.* 233. *The King against the Master and Fellows of St. Catherine's-hall, Cambridge*, with the authorities there cited.

cessary

cessary and requisite in this behalf, and the inquisitions thereof taken shall certify in the king's chancery: and as to other hospitals which be of another foundation and patronage than of the king; the ordinaries shall inquire of the manner of the foundation, estate, and governance of the same, and of all other matters and things necessary in this behalf, and upon that make thereof correction and reformation, according to the laws of holy church, as to them belongeth.

And by the 43 *El. c. 4.* Where lands and goods given to hospitals have been misapplied, the lord chancellor may issue commissions to inquire and take order therein (b): but this not to extend to hospitals which have special visitors or governors. And provided, that this act shall not extend to abridge the power of the ordinary.

4. By the aforesaid statute of the 39 *Eliz. c. 5.* In the hospitals so founded as aforesaid, they shall be placed, or

Of elections in hospitals (c).

(b) For the nature of these commissions see *Charitable Uses*. The court of chancery will also relieve by original bill upon a gift to charitable uses, within the 43 *Eliz.* and will settle or direct the disposition of an estate, within that statute, according to the intention of the testator. *Ib. in the ante.*

(c) On the subject of elections, see *Cathedrals*, 6. And *Deans and Chapters*, IV. 10. (5). To which add, that all aggregate corporations have a power necessarily implied, of electing members to fill up vacancies in the body politick, in order to perpetuate it. 1 *Roll. Ab.* 514. If the mode of election is prescribed by charter, or grant, or established by prescription, it must be accurately observed: in the absence of these it may be regulated by a bye-law; the right of making which is a power also incident to corporations in general. *Newling v. Francis*, 3 *T. Rep.* 189. 1 *Bl. Com.* 475. The right of election may also be regulated by a bye-law under the existence of a charter or prescription thus: If the power of making bye-laws originally is in the body at large, they may delegate the right of election to a select body, which thus becomes the representative of the whole community, for the purpose of election; but if the power of making bye-laws is vested in a select body, they cannot, by a bye-law, exclude an integral part of the body at large from voting, nor can they impose a qualification on the electors, contrary to the original constitution of the corporation. 4 *Rep.* 77. The case of corporations. 4 *Inst.* 48. 3 *Burr.* 1827. *Rex v. Spencer*, common-councilman of Maidstone. 4 *Burr.* 2515. *Rex v. Head*, freeman of Helsing.

upon just cause displaced, by such person or persons as shall be assigned by the founder, his heirs or assigns, by writing under his or their hand and seal, not being repugnant or contrary to the laws and statutes of this realm.

And by another clause in the same statute; it shall be lawful to the founder, his heirs or assigns, upon the death or removing of any head or member, to place one other in the room of him that dieth or is removed, successively for ever.

And by the 31 *Eliz. c. 6.* If any person shall take any reward for nominating to an hospital, his place (if he shall have any) in such hospital shall be void. And any person receiving any reward for resigning his place in any such hospital, shall forfeit double the sum, and the person for whom he resigns shall be incapacitated.

5. By the aforesaid statute of the 39 *Eliz. c. 5.* it is provided, that all leases or estates to be made by any such corporation, exceeding the number of twenty-one years, and that in possession, and whereupon the accustomed yearly rent or more, by the greater part of twenty years next before the taking of such lease, shall not be reserved and yearly payable, shall be void (*d*).

Taxes.

6. (1) By the 43 *Eliz. c. 2.* All lands within the parish are to be assessed to the *poor* rate.

And by Holt chief justice, *E. 1 An.* Hospital lands are chargeable to the poor as well as others; for no man by appropriating his lands to an hospital, can discharge or exempt them from taxes to which they were subject before, and throw a greater burden upon his neighbours. 2 *Salk. 127.*

In the case of *St. Luke's* hospital for lunatics, *M. 1 G. 3.* it was determined, that the said hospital was not chargeable to the parish rates; and that in general no hospital is so, with respect to the site thereof, except those parts of it which are inhabited by the officers belonging to the hospital, as the chaplain, physician, and the like, in *Chelsea* hospital. And these apartments are to be rated as single tenements, of which the said officers are the occupiers. The reason why the apartments in this hospital, of the sick or mad persons, are not to be rated is, that there are no persons who can be said to be the occupiers of them (and it is upon the occupiers of houses

(*d*) See *Leases.*

that the rate is to be levied). For it would be absurd to call the poor objects so with respect to this purpose; and the lessees of the hospital in trust for the charitable purposes to which it is applied, cannot with any propriety be considered as the occupiers of it; nor lastly, can the servants of the hospital, who attend there for their livelihood; and no other persons, said lord Mansfield chief justice, can with any shadow of reason be considered as the occupiers of it. *Burr. Mansf. 1053.*

By the annual acts for the *land tax*, it is provided, that the same shall not extend to charge any hospital, for or in respect to the site of such hospital, or any of the buildings within the walls and limits thereof; or to charge any of the houses or lands, which on or before Mar. 25, 1693, did belong to Christ's Hospital, St. Bartholomew, Bridewell, St. Thomas, and Bethlehem hospitals in London and Southwark; or to charge any other hospitals or alms-houses, for or in respect only of any rents or revenues, which on or before Mar. 25, 1693, were payable to the said hospitals or alms-houses, being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and alms-houses only.

Provided, that no tenants that hold any lands or houses, by lease or other grant from any of the said hospitals or alms-houses, do claim any exemption; but that all the houses and lands which they so hold, shall be rated for so much as they are yearly worth, over and above the rents reserved and payable to the said hospitals or alms-houses, to be received and disbursed for the immediate support and relief of the poor of the said hospitals and alms-houses.

Provided, that nothing herein shall be construed to extend to discharge any tenant of any the houses or lands belonging to the said hospitals or alms-houses, who by their leases or other contracts are obliged to pay all rates, taxes and impositions whatsoever; but that they shall be rated, and pay all such rates, taxes and impositions.

And if any question shall be made, how far any lands or tenements belonging to any hospital or alms-house, not exempted by name, ought to be assessed and charged; the same shall be determined by the commissioners upon the appeal day.

And there is, further, a general clause, that all such lands, revenues, or rents belonging to any hospital or alms-house, or settled to any charitable or pious use, as were assessed in the fourth year of *Will. 2nd Mar.* shall be liable to be charged; and that no other lands, tenements,

Jews.

ments, or hereditaments, revenues or rents whatsoever, then belonging to any hospital or alms-house, or settled to any charitable or pious uses, as aforesaid, shall be charged.

[6. (2) By the 25 G. 3. c. 43. s. 10. servants belonging to the above hospitals are exempted from the duty on servants.]

Hospitallers. See **Monasteries**.

Hotchpot. See **Wills**.

January the thirtieth. See **Holidays**.

Jews.

A Jew is to be sworn on the old testament; and perjury may be assigned upon that oath. 2 *Keb.* 313.

By the 10 G. 4. When any of his majesty's subjects, professing the jewish religion, shall take the oath of abjuration; the words, *upon the true faith of a christian*, shall be omitted. s. 18.

H. 2 G. 2. *Gomez Serra* and *Muniz*. Upon error in debt upon a bond, the bail being both jews, were suffered to put on their hats while they took the oath. *Sir.* 821.

By the 1 *An. fl.* 1. c. 30. If any jewish parent, in order to the compelling his protestant child to change his religion, shall refuse to allow such child a sufficient maintenance, suitable to the degree and ability of such parent, and to the age and education of such child; then, upon complaint thereof to the lord chancellor, it shall be lawful for him to make such order therein, for the maintenance of such protestant child, as he shall think meet.

Marriages, where both parties are jews, are excepted out of the marriage act of the 26 G. 2. c. 33.

Ile. See **Church**.

Images.

Images.

Winch. Images in the church, and the principal image in the chancel (viz. of the saint to whom the church is dedicated) shall be provided at the charge of the parish. *Lindw.* 251.

Arund. None shall bring into dispute the determinations of the church concerning the adoration of the glorious cross, the worship of the images as saints, or pilgrimages to the places or relicks of the same; but it shall be publickly taught and preached by all, that the cross, and image of the crucifix, and other images of the saints, in memory and honour of those whom they represent, and their places and relicks, ought to be worshipped by processions, kneeling, bowing, incense, kissing, oblations, illuminations, pilgrimages, and all other modes and forms whatsoever used in the times of us and our predecessors, on pain of incurring the guilt of heresy. *Lindw.* 297.

Art. 22. *The romish doctrine concerning the worshipping and adoration as well of images as of relicks, and also invocation of saints, is a fond thing, vainly invented, and grounded upon no warranty of scripture, but rather repugnant to the word of God.*

3 & 4 Ed. 6. c. 10. *Images in churches, of stone timber alabaster or earth, graven carved or painted, shall be defaced and destroyed.* s. 2.

But this not to extend to any image or picture, set or graven upon any tomb in any church, chapel, or churchyard, only for a monument of any king, prince, nobleman, or other dead person, which hath not been commonly reputed and taken for a saint. s. 5.

Also this shall not be done by any person of his own authority, but he ought to have the licence of the ordinary. *Cro. Jac.* 366.

And if any shall do so without the licence of the ordinary; Dr. Godolphin says, he shall bind him to his good behaviour: but the meaning is only, that *he may be bound to his good behaviour*, not by the ordinary, but by the temporal judge; as in *Pricket's case* (which is the case referred to), the offender was bound to his good behaviour, not by the ordinary, but by the lord chief justice of the court of king's bench.

Impropriation.

APPROPRIATION (as some say) is properly so called, when it is in the hands of a bishop, college, or religious house; *imprepiation*, when it is in the hands of a layman. But the words are generally used promiscuously. And the law concerning the same is treated of under the title Appropriation.

Inauguration day. See *Holidays*.

Incest. See *Lewdness*.

Incumbent. See *Benefice*.

Indemnity.

AN *indemnity* was, a pension paid to the bishop, in consideration of discharging or *indemnifying* churches united, or appropriated, from the payment of procurations; or by way of recompence for the profits which the bishop would otherwise have received during the time of the vacation of such churches. *Gibb. 706, 719.*

Indicavit.

INDICAVIT (so called from those words in the writ, *Indicavit nobis, &c.*) is a writ of prohibition that lieth for the patron of a church, whose clerk is defendant in the ecclesiastical court in an action for tithes, commenced by another clerk, and extending to the fourth part of the value of the church at least. In which case the suit belongs to the king's court by the statute of the 13 *Ed. 1. c. 5.* Wherefore the defendant's patron (being like to be prejudiced in his church and advowson, if the plaintiff obtain in the ecclesiastical court) hath this means to remove it to the king's court. *Terms of the L. F. N. B. 104.*

But

But if the tithes in question do not amount to the fourth part of the yearly value of the church ; the ecclesiastical court may determine the right on a writ of *Spoilation*. F. N. B. 70.

Induction. See *Benefice*.

Inhibition.

1. **A**N inhibition is a writ, to forbid a judge from farther proceeding in a cause depending before him, being in nature of a prohibition. *Terms of the law*.

And this writ most commonly issueth out of an higher court christian to an inferior, upon an appeal. *Id*.

But there are likewise inhibitions on the visitations of archbishops and bishops : thus when the archbishop visits, he inhibits the bishop ; and when a bishop visits, he inhibits the archdeacon : and this is to prevent confusion. *Id*.

2. By *Can. 96*. That the jurisdiction of bishops may be preserved (as near as may be) intire and free from prejudice ; and that for the behoof of the subjects of this land, better provision be made, that henceforward they be not grieved with frivolous and wrongful suits and molestations ; it is ordained, that no inhibition shall be granted out of any court belonging to the archbishop, at the instance of any party, unless it be subscribed by an advocate practising in the said court. And the like course shall be used in granting forth any inhibition at the instance of any party, by the bishop or his chancellor against the archdeacon, or any other person exercising ecclesiastical jurisdiction. And if in the court or consistory of any bishop there be no advocate at all ; then shall the subscription of a proctor, practising in the same court, be held sufficient.

3. And by *Can. 97*. It is further ordered and decreed, that henceforward no inhibition be granted by occasion of any interlocutory decree, or in any cause of correction whatsoever, except under the form aforesaid. And moreover, that before the going out of any such inhibition, the appeal itself, or a copy thereof (avouched by oath to be just and true), be exhibited to the judge or his lawful

Interdict.

surrogate, whereby he may be lawfully informed, both of the quality of the crime, and of the cause of the grievance, before the granting forth of the said inhibition. And every appellant, or his lawful proctor, shall before the obtaining of any such inhibition, shew and exhibit to the judge or his surrogate in writing, a true copy of those acts wherewith he complaineth himself to be aggrieved, and from which he appealeth; or shall take a corporal oath, that he hath performed his diligence and true endeavour for the obtaining of the same, and could not obtain it at the hands of the register in the country, or his deputy, tendering him his fee. And if any judge or register shall either procure or permit any inhibition to be sealed, so as is said, contrary to the form and limitation above specified; let him be suspended from the execution of his office, for the space of three months: and if any proctor, or other person whatsoever by his appointment, shall offend in any of the premises, either by making or sending out any inhibition contrary to the tenor of the said premises; let him be removed from the exercise of his office for the space of a whole year, without hope of release or restoring.

Instalment. See *Bishops*.

● Institution. See *Benefice*.

Interdict.

INTERDICT is an ecclesiastical censure, whereby the divine services are prohibited, either to particular persons, or in particular places, or both. *Lind.* 320.

And both these kinds of interdict have been frequently exercised heretofore, upon whole villages, towns, provinces, and even kingdoms; till they should make satisfaction for injuries done, or abstain from injuries they were doing, to the church. *Gibf.* 1047.

During the time of the interdict, baptism was allowed, because of the frailty and uncertainty of life; but the holy eucharist was not allowed, except in the article of death; so also christian burial was denied in any consecrated place, except it were done without divine offices, *Gr. App.* 18,

Rut

Intrusion.

341

But this censure hath been long disused; and nothing of it appeareth in the laws of church or state since the reformation. *Gibf.* 1047.

Interlocutory Decree.

AN interlocutory decree in the spiritual court, is that which doth not decide the cause, but only some incidental matter, which happens between the beginning and end of it.

Intestates.

THE law concerning intestates, being connected in many instances with the law concerning last wills and testaments, the whole is treated of together under the title *wills*.

Intrusion.

Otho. **F**Orasmuch as we understand, that certain priests casting an eye upon the benefice of a person who is absent, feigning reports that they have heard he is dead, or hath resigned his benefice; and so procure themselves to be intruded into the same benefice; and if perhaps he who was pretended to be dead shall return unto his church, answer is made unto him, I knew thee not, and the door is shut against him: and forasmuch also as others, blinded with covetousness, do presume privately or in what manner soever they can, to intrude themselves into the benefices not only of the absent but also of those who are present; and when they are in, neither the sentence of the judge, nor any other thing by which they may be ejected doth avail, but they defend themselves with force of arms: We do decree, and strictly enjoin, that no benefice in any wise be conferred, upon pretence of any fame or report of the death or

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cession

Intrusion.

cession of any person being absent; but the ordinary shall wait until he be fully informed in either case: otherwise he shall be bound to render the whole damages to such absent person; and moreover, he who hath procured himself to be intruded, shall besides the reparation of damages, be suspended ipso facto from his office and benefice. Which also shall extend to every one, who shall of his own authority or presumption, either privily or by force, obtain the possession of an ecclesiastical benefice which is full of another incumbent, and after it shall be declared to belong to such other shall endeavour to defend himself therein by force of arms. Athol. 32.

Nor any other thing by which they may be ejected] That is, not any spiritual censure. Id.

That no benefice in any wise be conferred] Either by collation of the bishop, or presentation of any other. Id.

Boniface. Forasmuch as it frequently happeneth, that divers clerks by lay power do possess themselves of churches parochial, or prebendal (even although they have the cure of souls), and are intruded into the same without ecclesiastical authority; we do decree, that a clerk so intruded into the church or prebend by himself or by lay power, shall be excommunicated in due form of law, and shall be denounced excommunicated by the diocesan of the place, and be disabled for ever ipso facto to hold that benefice. And if after sentence pronounced against him, he shall obstinately persist in such intrusion for two months; the profits of his other benefices (until he shall make satisfaction) shall be sequestered by the diocesans of the places where they shall be, upon denunciation of the bishop in whose diocese he intruded, and whose monition and excommunication he contemned. And if he shall persevere under such sentence of excommunication for a year, from thenceforth he shall not be admitted to any ecclesiastical benefice within the province. And if he was intruded by a proctor who was a clergyman, the like proceedings shall be against such proctor, and he shall be subject to the penalties aforesaid. And if such proctor was a layman, he shall be excommunicated in form of law, and be publicly so denounced. And his principal, if he be absent shall be cited; and if he shall appear and ratify what his proctor shall have done in this behalf, he shall be subject to the penalties aforesaid. But if by contumacy he shall absent himself for three months; if he be in the kingdom, he shall be excommunicated by the greater excommunication, and nevertheless shall incur the penalties aforesaid; especially since to his sacrilege he hath added disobedience and contempt: and if he shall be out of the kingdom, the like proceedings shall be had against him, after a citation, time being allowed for his being beyond sea. And the church or prebend in which

which such intrusion shall be made, shall be put under an ecclesiastical interdict. And the fautors and aiders of such intrusion, if they be clerks, shall incur the pains aforesaid ordained against clerks; and if they be lay persons, they shall be punished in like manner as is afore ordained for lay persons. And the places and lands of such intruders, if they do not make satisfaction within one month, shall be put under an ecclesiastical interdict. And if such intrusions be made by authority of the king, our lord the king shall be admonished by the diocesan of the place, to cause the same to be recalled within a time convenient; otherwise the lands and places which our lord the king hath in that diocese wherein the intrusion was made, shall be put under an ecclesiastical interdict, according to the form above expressed. And if such intrusion shall be made by any other of the nobility or person in authority, he shall be restrained by the sentences of interdict and excommunication as aforesaid; and if for two months he shall continue under such sentences pronounced against him for the same, from thenceforth his lands and places which he hath in that diocese shall be put under an ecclesiastical interdict by the diocesan of the place; nor shall the aforesaid sentences be relaxed, until he shall make competent satisfaction for the injury, disobedience, and contempt. *Lind. 319.*

Are intruded into the same without ecclesiastical authority] That is, without canonical institution. *Id.*

So intruded into a church or prebend by himself] That is, without lay power, and without violence. *Id.*

Or by lay power] And the same it is, if done by clerical power, such as is not ordinary nor authoritative. *Id.*

Shall be excommunicated in due form of law] Namely, preceded by a canonical monition to go away and quit the premises. *Id.*

Time being allowed for his being beyond sea] Which is arbitrary: respect being had of the place, and of the distance. *Lind. 320.*

And the church or prebend in which such intrusion shall be made, shall be put under an ecclesiastical interdict] Whereupon, in such church especially interdicted divine service cannot be performed. When a whole place is interdicted, this is called a general interdict. *Lind. 320.*

Our lord the king shall be admonished] This canon was made in the time of king Henry the third. And we may observe from hence, to what height the ecclesiastical authority was exalted at that time. But this part of the canon, denouncing judgments against the king, was never in force; being against the common law of the realm, and the prerogative royal.

Othobon. No patron, ecclesiastical or secular, shall presume to present any one to a church, in which he hath the right of patronage, unless he have probable notice of its vacancy; in which case, altho' he may present, to prevent the inconvenience of a lapse; yet the prelate to whom the institution appertaineth, shall by no means presume to admit or institute the person presented, unless it appear to him that the rector is dead, or that the church is otherwise become legally void. And it shall not be sufficient that the same shall appear to him, otherwise than by the bodily presence of the person dead or resigning or otherwise demising; or if he be absent, then by sentence of the bishop of the diocese in whose city or diocese he is said to have died or otherwise demised, or at least by letters of some other authentic person, sealed with one or more authentic seal or seals, by a public instrument, or by proper witnesses sworn and above all exception, by whom a sufficient and open testimony shall be given as the law requireth, not only of their belief but of their knowledge: and if any person shall in fact be instituted, or more properly intruded, into any church contrary to the premises, such institution shall be invalid and of no force, nor shall any right accrue to him thereby, altho' perhaps afterwards it may appear, that the church at the time of such institution was really void. And if it shall afterwards appear that the former rector is living, either by his appearing in person, or by authentic letters, or public instrument, or proper witnesses; as well the prelate instituting, as he who shall be so instituted, shall be bound to restore to such rector the whole fruits, damages and expences incurred thereby, the payment of the one being no discharge to the other. And because a pecuniary punishment is not sufficient, where there is a spiritual offence; the prelate who shall institute contrary hereto, shall nevertheless from the time of such offence be suspended from the collation institution or presentation of any benefices whatsoever, until possession of the church be restored to the rector aforesaid: adding moreover, that if after it shall appear as aforesaid, that the rector is living, the church shall not be restored to him, but contrariwise the intruder shall persist in his rebellion for three months, besides the punishments aforesaid, he shall for ever be deprived ipso facto of all the benefices which he hath in the kingdom, and shall be for ever disabled to accept that benefice which he hath so detained whenever or howsoever it shall be vacant; and if he have no benefice, he shall for ever be disabled to hold any benefice whatsoever in that diocese which he hath so wickedly disturbed. And moreover when probable notice, otherwise than by the aforesaid means, of the avoidance of a church or benefice, shall come to any archbishop or bishop unto whom the collation thereof belongeth, and he doth

collate to that church or benefice, fearing least a lapse should incur, yet he shall not deliver, nor suffer to be delivered, the corporal possession of that church or benefice, until proof of the avoidance shall be made in the manner aforesaid; nor shall he to whom the collation is made, presume to enter upon the possession by his own or any other authority: and if an archbishop or bishop shall do contrary hereunto, he shall be subject to the penalties aforesaid; and if he to whom the collation is made, shall take possession contrary to the premises, he shall for ever be deprived of that church or benefice, and nevertheless be subject to the other penalties aforesaid. Athon. 96.

One might wonder at first sight, what should make these two cardinals *Oibo* and *Othobon*, and also the aforesaid archbishop *Boniface*, who were all foreigners, such zealous asserters of the properties of the English clergy. We find no constitutions of our own native prelates that express such a concern upon this head. But the truth seemeth to be this: These provisions were made in behalf of absent clergymen. The chief occasion of the long absence of clergymen was their going to Rome to attend appeals, to procure dispensations or indulgences, to obtain preferment, or out of devotion to the apostolick see; or else they were foreigners who never came here at all. It was much to the advantage of the pope and city of Rome, that the travels of the clergy thither, and their long stay there should be encouraged; and other absentees be tolerated and dispensed withal. And truly, by these constitutions their rights were better secured in their absence, than they would have been by their being present and keeping residence. *Johns. Othob.*

Stratford. All clerks, who shall procure themselves to be presented or collated to dignities, parsonages, offices, or prebends, or other ecclesiastical benefices whatsoever, being full and possessed in fact by others; and shall directly or indirectly by virtue of the writs of quare non admittit, or quare impedit, or other such like, prosecute the bishops or others in the secular courts, without any mention made in the said writs of the possessors of the benefices, and without such possessors being regularly removed (altho' they have been cited); unless they first cause an inquisition to be made concerning the cause of the pretended vacancy by mandate of the ordinary, and the possessors to be canonically removed by competent judges ecclesiastical;—shall ipso facto incur the sentence of the greater excommunication, and as being so excommunicate shall in no wise be admitted to such benefices, but shall be deemed for ever disabled to hold the same. And if contrary to the premises, any one be instituted

or

or admitted into a benefice possessed by another *de facto*, such institution or admission shall be void in law. And whosoever shall so institute or admit, by his own right or by delegation, any person so presented or collated, into a benefice possessed by another, the possessor not being first removed by a sufficient authoritative sentence in the ecclesiastical court; he shall be suspended from his office and benefice, till satisfaction be made to the possessor for the whole damage which he shall sustain. And if the clerk so instituted or admitted shall suffer himself to be inducted contrary to the premisses into a benefice possessed by another; he shall be deemed an intruder, and shall incur *ipso facto* the penalties of intrusion contained in the constitution of Othobon, and the other penalties inflicted by the canons and holy fathers. Nevertheless by the premisses we do not intend to derogate from the power of the ordinary; but that he may collate to the benefices which he hath a right to collate unto, howsoever possessed by others *de facto* and not *de jure*: nor to restrain the persons receiving collations of such benefices. Lind. 144.

Possessed in fact by others] Altho' not *de jure*; because perhaps the incumbent hath not a just title. *Id.*

An intruder getting possession, and holding it by a strong hand and great power of the laity, *vi et armis*, against the spiritual authority; such force is removeable by the writ *de vi laica amovenda*. Which writ is usually issued, upon a certificate of the bishop into chancery touching such force and resistance: but may also be obtained upon a surmise made by him that is immediately grieved. But by this writ, the sheriff is not to remove the incumbent who is in possession of the church, whether the possession be of right or wrong; but only to remove the force; and to leave the incumbent to be removed by other legal means. *Gibf.* 783. (s)

Inventory. See *Wills*.

Investiture. See *Bishops*.

(s) *F. N. B.* 54, 55.

Inbitatory

Invitatory.

INVITATORY was a text of scripture, adapted and chosen for the occasion of the day, and used before the *Venite*; which also itself was called the invitatory psalm. *Gibb.* 263.

Judgment. See **Sentence**.

Jurisdiction. See **Courts**.

Juris utrum.

Juris utrum is a writ that lieth for the succeeding incumbent of a benefice, to recover the lands or tenements belonging to the church, which were aliened by his predecessor. *Terms of the law*.

And it is so called, in like manner as most of the other writs in the register, from certain words in the writ respecting the special matter for which the writ is brought.

By the statute of the 14 Ed. 3. st. 1. c. 17. *It is assented and established, that parsons, vicars, wardens of chapels, and provosts, wardens and priests of perpetual chantries, shall have their writs of juris utrum of lands and tenements, rents, and possessions annexed, or given perpetually in alms, to vicarages and chapels or chantries, and recover by other writs, in their case, as far forth as parsons of churches or prebends (f).*

Jus patronatus. See **Advowson**.

Kalendar.

1. **WHEREAS** the legal supputation of the year of Year to begin on the first day of January. of our Lord in that part of Great Britain called England, according to which the year beginneth on the

(f) See **Advowson**, 14, in the note.

twenty-

twenty-fifth day of March, hath been found by experience to be attended with divers inconveniencies, not only as it differs from the usage of neighbouring nations, but also from the legal method of computation in that part of Great Britain called Scotland, and from the common usage throughout the whole kingdom, and thereby frequent mistakes are occasioned in the dates of deeds and other writings, and disputes arise therefrom; and whereas the kalendar now in use throughout all his majesty's British dominions, commonly called the Julian kalendar, hath been discovered to be erroneous, by mean whereof the vernal or spring equinox, which at the time of the general council of Nice in the year of our Lord 325 happened on or about the twenty-first day of March, now happens on the ninth or tenth of the same month; and the said error is still increasing, and if not remedied would in process of time occasion the several equinoxes and solstices to fall at very different times in the civil year from what they formerly did, which might tend to mislead persons ignorant of the said alteration; and whereas a method of correcting the kalendar in such manner as that the equinoxes and solstices may for the future fall nearly on the same nominal days, on which the same happened at the time of the said general council, hath been received and established, and is now generally practised by almost all other nations of Europe; and whereas it will be of general convenience to merchants and other persons corresponding with other nations and countries, and tend to prevent mistakes and disputes in or concerning the dates of letters and accounts, if the like correction be received and established in his majesty's dominions; it is therefore enacted, that in and throughout all his majesty's dominions and countries in Europe, Asia, Africa, and America, belonging or subject to the crown of Great Britain, the said supputation, according to which the year of our Lord beginneth on the twenty-fifth day of March, shall not be made use of, from and after the last day of December 1751; and that from thenceforth the first day of January every year shall be reckoned and accounted to be the first day of the year. 24 G. 2. c. 23. f. 1.

Eleven days
thrown out.

2. And that from the first day of January 1752, the several days of each month shall go on and be reckoned and numbered in the same order, and the feast of Easter and other moveable feasts thereon depending shall be ascertained according to the same method as before, until the second day of September 1752 inclusive; and that the natural day
next

next immediately following the said second day of September, shall be called, reckoned, and accounted, to be the fourteenth day of September, omitting (for that time only) the eleven intermediate nominal days of the common kalendar; and that the several natural days, which shall follow and succeed next after the said fourteenth day of September, shall be respectively called, reckoned, and numbered forwards, in numerical order from the said fourteenth day of September, according to the order and succession of days now used in the present kalendar. 24 G. 2. c. 23. f. 1.

3. And that all acts, deeds, writings, notes, and other instruments of what nature or kind soever, whether ecclesiastical or civil, publick or private, which shall be made executed or signed, upon or after the said first day of January 1752, shall bear date according to the said new method of supputation. 24 G. 2. c. 23. f. 1.

*Writings to
bear date ac-
cording to the
new style.*

4. And that the two fixed terms of St. Hilary and St. Michael, in that part of Great Britain called England; and the courts of great sessions in the counties palatine, and in Wales; and also the courts of general quarter sessions, and general sessions of the peace; and all other courts of what nature or kind soever, whether civil, criminal, or ecclesiastical; and all meetings and assemblies of any bodies politick or corporate, either for the election of any officers or members thereof, or for any such officers entering upon the execution of their respective offices, or for any other purpose whatsoever: which by any law, statute, charter, custom, or usage within this kingdom, or within any other the dominions, or countries, subject or belonging to the crown of Great Britain, are to be holden and kept on any fixed or certain day of any month, or on any day depending upon the beginning or any certain day of any month (except such courts as are usually holden or kept with any fairs or marts)——shall from time to time, from and after the said second day of September, be holden and kept upon or according to the same respective nominal days and times, whereon or according to which the same are now to be holden, but which shall be computed according to the said new method of numbering and reckoning the days of the kalendar as aforesaid; that is to say, eleven days sooner than the respective days whereon the same were before holden and kept. 24 G. 2. c. 23. f. 1.

*Courts and
meetings.*

Provided, that the elections of officers in towns corporate, and doing of other corporate acts, which shall happen to fall upon any of the said eleven days dropt or entirely omitted, shall for that year only be made or done upon

the said new kalendar tables and rules. 24 G. 2. c. 23. *f.* 3.

Fairs.

7. The several meetings of the court of session, and terms fixed for the court of exchequer in Scotland; and April meeting of the governor, bailiffs, and commonalty of the company of conservators of the great level of the fens; and the holding and keeping of all markets, fairs, and marts, whether for the sale of goods or cattle, or for the hiring of servants, or for any other purpose, which are either fixed to certain nominal days of the month, or depending upon the beginning of any certain day of any month; and all courts incident or belonging to, or usually holden or kept with any such fairs or marts, fixed to such certain times as aforesaid;— shall not be continued upon or according to the nominal days of the month, or the time of the beginning of any month, to be computed according to the said new kalendar; but they shall be holden and kept upon, or according to the same natural days, on or according to which the same should have been so kept or holden, in case this act had not been made, that is to say, eleven days later than the same would have happened according to the nominal days of the said new supputation of time, by which the commencement of each month and the nominal days thereof are anticipated or brought forward by the space of eleven days. 24 G. 2. c. 23. *f.* 4.

Pastures; rents;
coming of age.

8. And whereas according to divers customs prescriptions and usages in certain places within this kingdom, certain lands and grounds are on particular nominal days and times in the year to be opened for common of pasture and other purposes, and at other times the owners and occupiers of such lands and grounds have a right to inclose or shut up the same for their own private use; and there is in many other instances, a temporary and distinct property and right vested in different persons, in and to many such lands and grounds, according to certain nominal days and times in the year; and whereas the anticipating or bringing forward the said nominal days and times, by the space of eleven days, according to the said new method of supputation, might be attended with many inconveniences: it is therefore further declared and enacted, that nothing herein shall extend to accelerate or anticipate the days or times for the opening, inclosing, or shutting up any such lands or grounds as aforesaid, or the days or times on which any such temporary or distinct property or right in or to any such lands or grounds as aforesaid is to commence; but that all such lands and grounds shall be respectively

ſpectively opened, incloſed, or ſhut up, and ſuch temporary and diſtinct property and right in and to ſuch lands and grounds as aforeſaid ſhall commence and begin upon the ſame natural days and times on which the ſame ſhould have been ſo reſpectively opened, incloſed, or ſhut up, or would have commenced or begun in caſe this act had not been made, that is to ſay, eleven days later than the ſame would have happened according to the ſaid new account and ſupputation of time, ſo to begin on the ſaid fourteenth day of September as aforeſaid. 24 G. 2. c. 23. ſ. 5.

Provided alſo, that this ſhall not extend to accelerate or anticipate the time of payment of any rent, annuity, or ſum of money, which ſhall become payable by virtue or in conſequence of any cuſtom, uſage, leaſe, deed, writing, bond, note, contract, or other agreement whatſoever, now ſubſiſting, or which ſhall be made, ſigned, ſealed, or entred into before the ſaid fourteenth day of September, or the time of doing any matter or thing directed or required by any ſuch act of parliament to be done in relation thereto; or to accelerate the payment of, or increaſe the intereſt of any ſuch ſum of money which ſhall be payable as aforeſaid; or to accelerate the time of the delivery of any goods, chattels, wares, merchandize, or other things whatſoever; or the time of the commencement, expiration, or determination of any leaſe or demiſe of any lands, tenements or hereditaments, or of any other contract or agreement whatſoever; or of the accepting, ſurrendring, or delivering up the poſſeſſion of any ſuch lands, tenements, or hereditaments; or the commencement, expiration, or determination of any annuity or rent; or of any grant for any term of years, of what nature or kind ſoever, by virtue or in conſequence of any ſuch deed, writing, contract, or agreement; or at the time of the attaining the age of one and twenty years, or any other age requiſite by any law, cuſtom or uſage, deed, will or writing whatſoever, for the doing any act, or for any other purpoſe, by any perſon now born, or who ſhall be born, before the ſaid fourteenth day of September; or the time of the expiration or determination of any apprenticeship or other ſervice, by virtue of any indenture, or of any articles under ſeal, or by reaſon of any ſimple contract or hiring whatſoever: but that all ſuch rents, annuities, ſums of money, and the intereſt thereof, ſhall remain and continue to be due and payable; and the delivery of ſuch goods and chattels, wares and merchandizes ſhall be made; and the ſaid leaſes and demiſes of all ſuch lands, tenements,

and hereditaments, and the said contracts and agreements shall be deemed to commence, expire, and determine; and the said lands, tenements and hereditaments shall be accepted, surrendered, and delivered up; and the said rents, and annuities, and grants for any term of years shall commence, cease, and determine,—at and upon the same respective natural days and times, as the same should and ought to have been payable, or made, or would have happened, in case this act had not been made; and that no further or other sum shall be paid or payable for the interest of any sum of money whatsoever, than such interest shall amount unto, for the true number of natural days for which the principal sum, bearing such interest, shall continue due and unpaid; and that no person shall be deemed or taken to have attained the said age of one and twenty years, or any other such age as aforesaid, until the full number of years and days shall be elapsed, on which such person would have attained such age, or would have completed the time of such service as aforesaid, in case this act had not been made. *s. 6.*

Provided always, that whereas in divers parts of this kingdom, by custom, prescription or usage, or by virtue of some law or contract, certain lands and grounds, are to be opened and used for common pasture or other purposes, and the same lands and grounds are again inclosed and shut up; and certain rents or other payments are due and payable; and some other matters and things may be to be done, upon some of the moveable feasts, or upon certain days or times depending upon or to be computed from the same; it is enacted, that from and after the said second day of September, the respective times for opening, using, inclosing, and shutting up all such lands and grounds as aforesaid, for the paying of such rents or other payments, and for the doing of such other matters or things as aforesaid, if such times are depending on any moveable feast, shall be computed and take place according to the said new kalendar, and not according to the method of supputation heretofore used; and the temporary and distinct property and right of all persons, bodies politick and corporate, or to and in all such lands and grounds, shall commence and be enjoyed, and all such rents and payments shall become and be due and payable, and all such matters and things shall be transacted and done accordingly. *23 G. 2. c. 30. s. 2.*

King's inauguration. See *Holidays*.

King's supremacy. See *Supremacy*.

Lapse.

1. **LAPSE**, *lapsus*, is a slip or departure of a right of ^{Lapse, what.} presenting to a void benefice, from the original patron neglecting to present within six months next after the avoidance. Whence it is commonly said, that such benefice is in lapse or lapsed, whereunto he that ought to present hath omitted or slipped his opportunity. *God. 242.*

And in such case the patronage doth devolve from the patron to the bishop, from the bishop to the metropolitan, and from the metropolitan to the king; that is, to the bishop, as ordinary; to the metropolitan, as superior; and to the king, as patron paramount. *Gibf. 768.*

For it is to be remembred, that churches and dioceses were of common right under the care of the bishops; and it was by particular indulgence that the patrons had the right of presentation; which being neglected, things do return to common right; and therefore the bishop hath a true interest, and acts not in the right of the patron, but his own. And if the bishop doth not collate within six months, then it falls to the archbishop; not as ordinary, but as superior; to whom the right of devolution falls upon the inferior's neglect. Upon the metropolitan's neglect, then it falls to the king (as the lawyers express it) as patron paramount of all the benefices within the realm; by which is meant, that the king by right of his crown is to see that all places be duly supplied with persons fit for them; and if all others whom the law hath intrusted, do neglect their duties, then by the natural order and course of government it falls to the supreme power, which is to supply defects, and to reform abuses. 1 *Still. 320. (g)*

2. The term or space, in which title by lapse accrues ^{Incurred in six} successively to the forementioned superiors, is six months. ^{months.} The canon law upon this head did make a distinction between lay patrons, and clergymen being patrons; appointing four months in case of the former, and six months in case of the latter. But the common law observeth not this distinction; but gives ecclesiastical and temporal patrons an equal title to present at any time within the six months. *Gibf. 768.*

(g) See *Benefice, I. 9.*

And because this computation doth concern the church, therefore it shall be made according to the computation of the church, that is, by the kalendar, for one half year, and not accounting twenty-eight days to the month; and the day on which the church becomes void, is not to be taken into the account. 2 *Inst.* 360.

From what time
the months to
be computed.

3. As to the time from which the six months are to commence, the rule of the canon law in all cases was, that the six months shall be reckoned not from the time of the avoidance, but from the time of notice; and so it is held in some of the old books. *Gibf.* 769. (b)

Thus Rolle saith, that the six months shall begin from the time of the patron's knowledge of the avoidance; and so it was adjudged upon a writ in the time of king Edward the second. As if the incumbent die beyond sea, the six months shall not be computed from the time of his death, but from the time of the patron's knowledge thereof; and so it was adjudged in a case between the abbot of St. Mary's York, and the bishop of Norwich, in a *quære non admittit*. For the six months shall not be reckoned from the death of the last incumbent, but from the time the patron might (according to a reasonable computation, having regard to the distance of the place where he was at the time of the incumbent's death, if he were within the realm at that time) have come to the knowledge thereof: for he ought afterwards to take notice thereof at his peril, and not before, for that he was in some other county than that where the church is, and wherein the incumbent died. 2 *Rolle's Abr.* 363.

And Dr. Watson saith, the law (he finds) hath been holden to be, that the six months for lapse upon an avoidance, shall not be accounted but from the time the patron could reasonably be supposed to have notice of the incumbent's death; especially if the patron or incumbent should happen to be beyond the seas, or in some remote county within the realm at the time of such avoidance: but by the common law of England (he says) the six months, as he supposeth, shall be accounted from the time of the death. *Watf. c. 1. (i)*

And Dr. Gibson saith, forasmuch as the former notion was attended with great uncertainty, therefore the com-

(b) *Semestre tempus non a tempore vacationis sed notitiae ipsius potius volumus computari.* X. 3. 8. 5.

(i) 2 *Leon.* 46. *Dyer* 327. b. 6 *Rep.* 62.

mon law hath made this distinction; that where the avoidance is occasioned by an act between the ordinary and the incumbent (as in the case of deprivation, and resignation) lapse shall incur from the notice given by the bishop, or (if he die) by his successor; but where it is occasioned by the act of God (as in the case of death), or by the act of the incumbent (as in the case of cession), no notice need to be given, but the patron is bound to take notice of it; and so, lapse shall incur from the time of death or cession. *Gibf. 769. 1 Still. 251. (k)*

4. But where a clerk is refused for want of abilities or morals, tho' the patron ought to have notice, that he may present another in due time; yet if he neglect, the lapse shall incur from the death or cession, and not from the time of the notice. And in this case, where a *spiritual* person presents an illiterate clerk, it hath been adjudged, that lapse incurs without any notice, because the law supposeth such to be judges of the abilities of their clerk, and that therefore they ought not to have presented an insufficient clerk. *2 Roll's Abr. 364. Gibf. 769.* Case where an insufficient clerk is presented (l).

It hath also been held, that altho' no lapse shall incur, if no notice be given; yet, if in such case a stranger present, and his clerk is instituted and inducted, and the patron gives no disturbance within six months, he has no remedy for that turn: because induction is a notorious act, of which he is bound to take notice. *Gibf. 769. Nay 65.*

But if the clerk whether of an ecclesiastical or lay patron be not refused, but only the bishop doth delay the examination of him, whereby the six months pass; lapse shall not incur, because the church remains void by the bishop's own default, and he is thereby a disturber. *Walf. c. 12. (m)*

5. And generally, lapse shall incur or not incur, according as it happeneth or doth not happen thro' the default of the bishop, and according as he is named or not named in the writ of *quare impedit* brought upon that occasion. Where the lapse happeneth thro' the bishop's own default.

(k) In general, where a person is deprived, notice of the sentence must be given to the patron before a lapse shall accrue to the bishop. See *Walf. c. 6. (P. 52. Ed. 4.) Dy. 292.* But if an incumbent be inducted into a second living within the statute 21 H. 8. the first is voided *ipso facto*, and notice is not necessary. *Cro. Eliz. 601. Cro. Car. 357.*

(l) See *Benefice, L. III.*

(m) *2 Roll. Ab. 366.*

So, if he will not award a *jus patronatus* when required, or refuseth the clerk without cause, and the church becomes litigious; in such cases the lapse shall not incur. But if he do what is his duty upon a presentment made to him, and refuseth with good cause, and is not named in the *quare impedit*; or if no presentation is made, and yet a *quare impedit* is brought against patron and ordinary; the lapse shall incur, and his collation thereupon shall be good. *Gibf. 769. (n)*

Also, after the commissioners, and upon a *jus patronatus* awarded, have certified the right as it is found before them, the bishop shall not take advantage of the lapse; that is, if the clerk of the patron for whom it is certified doth afterwards make a new request to the ordinary to be admitted, which may be done upon the first presentation; but without such after request, the ordinary may have the void turn, as by lapse, such inquiry and certificate notwithstanding. *Watsf. c. 12.*

Also if when a church is litigious, no *jus patronatus* is awarded, but only an assise of *darrein presentment* or *quare impedit* is brought by one party, who doth recover against the other; if the bishop was not named in the writ, and the six months pass pending the same, lapse shall incur, for that there was no default in the bishop. And tho' the patron in such case doth recover within the six months; yet if the six months pass before the writ to the bishop be taken forth, lapse shall incur: and if the ordinary doth collate before the receipt of the writ; his clerk shall not be removed. And so it is, if after the recovery within the six months, the defendant doth bring a writ of error, and the six months do pass pending the same; unless the plaintiff, before the six months by such means pass, doth bring a *quare impedit* against the bishop, for thereby it hath been said that lapse shall be prevented. However it is generally said, that if a *quare impedit* in any case be brought, and the bishop be named therein, lapse shall not pass to the ordinary pending the writ. *Watsf. c. 12. (o)*

Lapse shall not incur per saltum.

6. Title by lapse can never accrue to the metropolitan, or to the king, unless it hath first accrued to the immediate

(n) *Cro. Ja. 93. Hob. 200.*

(o) *Hob. 201.* And a *ne admittas* may be sued out against the bishop. *Abbottson, 14.* But he ought to see that the cure be served by allowance out of the profits, to be taken by sequestration. *Cro. Ja. 93. Lancaster v. Low.*

ordinary. This is agreed on all hands, even tho' the lapse be lost by default of the ordinary, as for want of giving notice, or the like; and for the same reason, if a clerk is instituted, and remains eighteen months without induction; tho' institution is no plenary against the king, yet being so against the bishop, no title by lapse shall accrue to the king. *Gibf. 769. Wals. c. 12. (p)*

And by the statute of the 25 Ed. 3. ft. 3. c. 7. *Because that many presentments to divers benefices of holy church, as well of the patronage of lay people, as of people of holy church, which were void by six months, whereof the collation by lapse of time was devolute and of right pertaining to the ordinaries of the places, were recovered by the king by judgments thereof given of the assent of the said patrons, in deceit of the said collations so made reasonably by the said ordinaries; in which pleas, the ordinaries, nor their clerks, to whom they did give such benefices, were not received to shew nor defend their right in this behalf, nor to counterplead the king's right so claimed: the king, by the assent of the parliament, willeth and granteth for him and his heirs, that when archbishops, bishops, or other ordinaries have given a benefice of right devolute to him by lapse of time, and after the king presenteth and taketh the suit against the patron, which percase will suffer that the king shall recover without action tried, in deceit of the ordinaries, or the possessors of the said benefices; that in such case, and all other cases like, where the king's right is not tried, the archbishop or bishop, ordinary, or possessor, shall be received to counterplead the title taken for the king, and to have his answer and to shew and defend his right upon the matter, altho' that he claim nothing in the patronage in the case aforesaid.*

7. Altho' the bishop be both patron and ordinary, he Bishop being shall not have a double time to present in, but only six both patron and ordinary, months, before title by lapse accrues to the metropolitan. shall not have And there is a parity of reason, for its passing from the twice six metropolitan to the king in six months, where the me- months. tropolitan is both patron and ordinary (as it frequently happeneth in churches within his own diocese); for the title by lapse is in the nature of a trust, and not of an interest; and the self-same person who hath neglected that trust, and kept the church destitute of a pastor for one six months, ought not in equity to have it in his power

(p) *Co. Lit. 344. b. 2 Roll. Ab. 368. Cro. Ja. 93. Plow. 498.*

to keep it vacant for six months more. *Gibf.* 769. *Watsf.* c. 12.

Lapse incurred during the metropolitan visitation.

8. If an archbishop doth visit an inferior diocese, and doth inhibit the bishop during the visitation (as the use is), and afterwards during the visitation and inhibition, and before any release made by the archbishop, some church in the same diocese doth lapse; altho' that the jurisdiction of the ordinary be suspended during the visitation, so that he cannot in any such case collate his clerk himself, yet he shall have the benefit of the lapse, and not the archbishop; to whom in this case the bishop must as a common person present his clerk, and the archbishop as his ordinary ought to institute upon such presentment. *Watsf.* c. 12. (g)

And the reason is plain; for altho' the bishop is under inhibition during the time of the visitation, yet such inhibition reacheth not his right of patronage, but only suspends his right of institution and collation; and therefore the only difference is, that instead of collating by his own authority, he is to present his clerk to the archbishop for institution. *Gibf.* 770.

Bishop dying after lapse incurred.

9. If title by lapse is accrued to the bishop, and he dies, or is translated, or deprived, before he takes the benefit of it; the devolution is to the metropolitan, as he is guardian of the spiritualties, and as this is not an interest, but a mere spiritual trust. For altho' it is laid down in an ancient writ, as a thing notorious, that churches which belonged to the collation of bishops while they lived, do belong to the king by reason of his custody thereof in the time of the vacation; yet this relates only to such voidances as belong to the bishops in their own right; but lapses belong to the guardians of the spiritualties, whoever they be. *Watsf.* c. 12. *Gibf.* 770. (r)

No lapse from the king.

10. By the statute of *Prerogativa regis*, 17 Ed. 2. c. 8. *Of churches being vacant, the advowsons whereof belong to the king, and other present to the same, whereupon debate ariseth between the king and other: if the king by award of the court do recover his presentation, tho' it be after the lapse of six months from the time of the avoidance, no time shall pre-judice him, so that he present within the space of six months.*

2 Roll. Ab. 267.

1 Nov. 69. 2 Roll. Ab. 345. 357.

The meaning of which statute is, that where a church belonging to the patronage of the king is litigious, and not recovered in six months, lapse shall not incur, as in the case of a common person: but the last clause seemeth to be a limitation of that privilege; viz. on condition that the king present within the space of six months after it is recovered; and if he present not, then lapse to incur. But it being a maxim in law, that *nullum tempus occurrit regi*, and the restraining words being not express, that the prerogative shall be restrained in that particular, but only words of implication; the law is taken to be that the church can in no wise go in lapse from the king. *Gibf.* 766, 770.

And therefore there is no remedy against a neglect in the king to fill vacant churches, but only the ordinary's sequestering the profits of the church, and appointing a clerk to serve the cure. *Gibf.* 770. (s)

11. After a church is lapsed to the immediate ordinary, if the patron doth present before the ordinary hath filled the church, the ordinary ought to receive his clerk. For lapse to the ordinary is only an opportunity of executing a trust, viz. of seeing the cure supplied in case of the patron's neglect; which being performed by the patron himself, the ordinary can take no advantage by it. *Watf.* c. 12.

Patron's right where advantage of the lapse is not taken.

And the like law is, if lapse be accrued to the metropolitan: for then, if the patron present to the inferior ordinary, whilst the church remains void, he is bound to receive his clerk, and the metropolitan is barred. *Watf.* c. 12. (t)

But if the ordinary of the diocese, or metropolitan, hath collated his clerk, whilst the turn was respectively theirs, altho' the clerk be not inducted; the patron's clerk, if after that presented, is not to be admitted. *Watf.* c. 12. (u)

Or if the inferior ordinary, after the time is gone by lapse to the metropolitan, hath collated his clerk to the benefice that is in lapse; altho' this collation be tortious to the metropolitan, yet it seems that it takes away the presentation of the patron, so that he shall not present, and is only an usurpation upon the metropolitan (w): and

14 H. 7. 21. Dr. & Stud. 2. 36.
Andersf. 148. *Hutton* 24. Dr. & Stud.
 r 277. (w) 2 Roll. Ab. 350. 368.

thereby

thereby the metropolitan is put out of possession, and driven to his *quare impedit*. *Watf. c. 12. (x)*

It hath been a question, whether the bishop ought to admit the patron's clerk, after the title of lapse is passed from the metropolitan to the king (y). And by Hobart, the patron's presentation takes place, after the church is lapsed to the king, if it be exhibited to the ordinary before the king's; because the patron's right to present continueth, until the title by lapse be executed, and the king's title is not vested in him in this case absolutely, as other titles are, but conditionally, viz. if he doth present before the patron; because the king hath it only as supreme ordinary. But by others, the turn is by lapse so vested in the king, that if the patron's or other person's clerk be admitted to a church, after it is come to the king by lapse; the king by *quare impedit* may recover the presentment, and remove such clerk. And this latter opinion is taken to be the law. So if the king hath title by lapse, to present to a prebend of his free chapel, for that the dean thereof hath not collated to it within six months; tho' the dean doth collate before the king presents, yet the king shall remove his clerk. *Watf. c. 12. (z)*.

And this power in the king is in effect the same that the pope claimed and exercised; as appears by the direction given to his legates in this very case, which became part of the body of the canon law; where speaking of such benefices, or dignities as were lapsed to him, and filled by the patrons notwithstanding such lapse, he orders them to permit the persons so presented, if they be persons fit and sufficient, peaceably to enjoy the same; otherwise that they remove them, and put others sufficient in their places. *Gibf. 770. (a)*

But if in such case, the patron's clerk is suffered to die incumbent, or is deprived, the king's turn is served, and he hath lost the advantage of the lapse. Upon which head all the books are clear, as to death; and most of them, as to deprivation; but many of them will not allow the same

(x) 6 Rep. 30. b. *Green's case*. *Ib.* 50. *Boswell's case*.

(y) *Dyer* 277.

(z) By *Hobart*, the patron's title continues against the king as well as ordinary till the lapse be executed. *Hob.* 154 *Acc. Hutton* 24. *Contra* 2 *Ro. Ab.* 368. *Gre. Ja.* 216.

(a) *X.* 1. 10. 4.

reason, in case of resignation, because there is room to suspect fraud and covin. *Gibf.* 770. (b)

12. A donative remaining void never goes in lapse, ^{No lapse of a} unless it be specially provided for by the foundation, or donative. by composition afterwards; but the ordinary may compel the patron to fill the same, by ecclesiastical censures. *Walsf. c.* 12. (c)

But if it is augmented by the governors of queen Anne's bounty, it will lapse in like manner as presentative livings. 1 *G. fl.* 2. c. 10. s. 7.

Leases.

1. **BY** the common law, bishops with the confirmation ^{Leases by the} of the dean and chapter, master and fellows of ^{common law,} any college, deans and chapters, master or guardian of any hospital and his brethren, parson or vicar with the consent of the patron and ordinary, archdeacon, prebendary, or any other body politick, spiritual, and ecclesiastical, might have made leases for lives or years without limitation or stint; and so might they have made gifts in tail, or estates in fee, at their will and pleasure; whereupon not only great decay of divine service, but dilapidations and other inconveniences ensued; and therefore they were disabled and restrained by several statutes (d). 1 *Inst.* 44. 3 *Co.* 75.

Corporations *aggregate*, consisting of divers persons, as master and fellows, dean and chapter, might of themselves have made such grants, without confirmation; nor is any confirmation yet required to such leases as they may make by statute. *Gibf.* 744.

But the law did not think fit to trust a single person, or *sole* corporation, as an archbishop, bishop, archdeacon, prebendary, parson, vicar, with the disposition of estates held in right of the church; and therefore, by way of restraint, appointed the assent and confirmation of some others, without which their grants should not be valid against the successor. *Id.*

(b) 7 *Rep.* 28. *Baker's case.* *Cro. Eliz.* 44. *Cro. Ja.* 53 and 216. *Healey* 125. 1 *Andersf.* 148.

(c) *Yelv.* 61. *Co. Lit.* 344. a.

(d) See *Doug.* 573. and cases there cited.

Accordingly,

Accordingly, all leases of archbishops and bishops (to bind their successors) were to be confirmed by the dean and chapter, or deans and chapters if there be several chapters; leases of deans, by the bishop and chapter; leases of archdeacons, prebendaries, and the like, by the bishop, dean, and chapter; leases of parsons and vicars, by the patron and ordinary; and leases of the incumbent of a donative, by the patron alone: but if the king be patron of a prebend, or the like, then the king and dean and chapter, and not the bishop, ought to confirm the lease. *Gibf.* 744. *Degge*, p. 1. c. 10. *Waif.* c. 44.

But all these sole corporations, as archbishops, bishops, archdeacons, prebendaries, and the like (parsons and vicars only excepted) were enabled by the statute of the 32 *H.* 8. hereafter following, to let leases for twenty-one years or three lives, without confirmation; provided that in such leases the conditions and limitations of the said act, as to the expiration of the old lease, the commencement of the new, the reservation of rent, and the like, were punctually observed; but if not, confirmation remained necessary, as before, in order to bind the successor. And with confirmation, long leases of sole corporations continued (so far as that act is concerned) to be good against the successor, as they had been at the common law. *Gibf.* 744.

Afterwards, by the statutes of the 1 *El.* 13 *El.* and 18 *El.* all corporations, whether sole or aggregate, were disabled from making leases for more than twenty-one years or three lives; and all (except bishops) from making any new lease, where the old was not expired or surrendered or ended within three years. In which cases, confirmation was excluded, and could avail nothing; and therefore confirmation is of real effect only to two sorts of sole corporations, viz. 1. To parsons and vicars; who being specially excepted out of the enabling act of the 32 *H.* 8. cannot nor ever could bind their successors without confirmation: and, 2. To bishops; who being not included in the restraint of the 18 *El.* hereafter mentioned against concurrent leases, may still (as at common law they might) let such leases at any time, with confirmation; as will appear more particularly, in the recital and explanation of the several statutes. *Gibf.* 744.

Leases by the enabling statute of the 32 *H.* 8.

2. By the 32 *H.* 8. c. 28. *All leases to be made of any manors, lands, tenements, or other hereditaments, by writing indented, under seal, for term of years, or for term of life, by any person or persons being of full age of twenty-one years, having*

ing any estate of inheritance either in fee-simple or in fee-tail, in their own right, or in the right of their churches or wives, or jointly with their wives, of an estate of inheritance made before the coverture or after, shall be good and effectual in the law against the lessors, their wives, heirs, and successors, and every of them, according to such estate as is comprised and specified in every such indenture of lease, in like manner and form as the same should have been, if the lessors thereof, and every of them, at the time of the making of such leases, had been lawfully seised of a good, perfect and pure estate of fee-simple thereof, to their own only uses. §. 1.

But this shall not extend (1) to any leases to be made of any manors, lands, tenements, or hereditaments, being in the hands of any farmer or farmers, by virtue of an old lease, unless the same old lease be expired, surrendered, or ended within one year next after the making of the said new lease; nor (2) shall extend to any grant to be made of any reversion of any manors, lands, tenements, or hereditaments; nor (3) to any lease of any manors, lands, tenements, or hereditaments, which have not most commonly been letten to farm, or occupied by the farmers thereof by the space of twenty years next before such lease thereof made; nor (4) to any lease to be made without impeachment of waste; nor (5) to any lease to be made above the number of twenty-one years or three lives at the most from the day of the making thereof; and (6) that upon every such lease there be reserved yearly during the same lease, due and payable to the lessors their heirs and successors to whom the same lands should have come after the deaths of the lessors if no such lease had been made thereof, and to whom the reversion thereof shall appertain, according to their estates and interests, so much yearly farm or rent, or more, as hath been most accustomedly paid for the same within twenty years next before such lease thereof made. §. 2.

And every such person to whom the reversion shall appertain, after the death of such lessors, or their heirs, shall have like remedy and advantage against the lessees, their executors and assigns, as the same lessor might have had against the same lessee: so that if the lessor were seised of any special estate tail of the same hereditaments at the time of such lease, the issue or heir of that special estate shall have the reversion, rents, and services, reserved upon such lease after the death of the said lessor, as the lessor himself might have had if he had lived. §. 2.

Provided, that nothing herein shall extend to give any liberty or power to any parson or vicar of any church or vicarage, to make any lease or grant of any of their messuages, lands, tenements,

ments, tithes, profits, or hereditaments, belonging to their churches or vicarages, otherwise or in any other manner than they might have done before the making of this act. c. 4.

All leases to be made, &c.] Before this statute, altho' corporations aggregate of many (as deans and chapters) might have made long leases for lives or years, of themselves and without any consent or confirmation; yet if such leases had been made by a sole corporation (as bishop, archdeacon, prebendary), and not confirmed by such other person or persons whose consent was necessary, they expired with the lessor, and could not bind the successor. But by this statute, all such sole corporations (except parsons and vicars) are *enabled* to make leases for twenty-one years or three lives, without any confirmation whatsoever (the several conditions which follow in the statute being punctually observed); for which reason it is called the *enabling* statute, and so it wholly was, and had nothing in it of restraint; but left aggregate corporations, and also sole corporations *with proper consent*, to their full liberty of going on to make all such leases as they might have made before; without being limited at all to the conditions of this statute, if they had but the same proper confirmation or consent. *Gibb 732.*

Of any mansrs, lands, tenements, or other hereditaments] It must be of lands, tenements, or hereditaments, manurable or corporeal, which are necessary to be letten, and whereout a rent by law may be reserved; and not of things that lie in grant, as advowsons, fairs, markets, franchises and the like, whereout a rent cannot be reserved. *1 Inst. 44.*

For the better understanding of which rule, it will be necessary to take notice of some distinctions which plainly arise out of the books. As, first; All the books agree, that a lease *for three lives*, of tithes or other incorporeal inheritance, will not bind the successor, because he would then be without the tithes or other such incorporeal inheritance, and have no remedy for the rent thereon reserved; for distrain he could not, because there would be no place wherein to take any distress, the things leased or granted being perfectly incorporeal, and invisible; an assize he could not have, because either he had not seisin, or if he had yet there would be nothing to put in view of the recognitors; and an action of debt he could not maintain during the lease, because being for three lives, that is an estate of freehold, which will endure no action of

of debt so long as it continues: and so the successor in such case would have no manner of remedy for the rent reserved, which would be against the express provision and intent of the several acts. Secondly, it is held in some books, that a lease *for twenty-one years* of such incorporeal inheritance, tho' they have been usually demised, and the ancient rent be thereout reserved, is yet voidable by the successor within these statutes: because tho' the rent reserved be good by way of contract between the lessor and lessee, and an action of debt may be maintained for the recovery thereof, yet they say it is not such a rent as is incident to the reversion, nor shall pass with it to the successor; and therefore the successor, having no remedy for the rent, shall not be bound by the lease. 5 Co. 3. Litt. 44.

But this point seems to have been shaken by contrary resolutions. For some books expressly hold such lease for years to be good against the successor, because they say he has remedy for the rent by action of debt, and say it has been so judged, and take the diversity between such lease for years and a lease for life. Also they say, that the rent issues out of the tithes in point of render, tho' not in point of remedy; because no distress can be taken for it; but that is supplied by the action of debt, which lies for such rent, and shall devolve on the successor; and that such rent doth not lie only in privity of contract, as a sum in gross, but is incident to the reversion, otherwise the successor could not have it, being only privy to the estate, not to the personal contracts of his predecessor. And to this opinion the court inclined, but thought it a point of great consequence, and therefore to avoid it gave judgment on another point which was clear. Thirdly, all the books agree, that a lease for three lives or twenty-one years, of a manor with the advowson appendant or of lands or houses and of tithes, usually let therewith reserving the ancient rent, and the like, is good and shall bind the successor; for tho' the rent doth not issue out of the advowson, or tithes, in point of remedy, yet the rent is greater in respect thereof, and the successor hath his remedy for the whole rent upon the lands or other corporeal inheritance let therewith. And Vaughan proves this from the express words of the statute of the 13 Eliz. which are, that all leases by any spiritual or ecclesiastical persons, having any lands tenements *tithes* or hereditaments, (other than for twenty-one years or three lives,)

lives,) shall be void. So that the statute plainly shews, that some way or other tithes may be leased for twenty-one years or three lives, and if they cannot be leased singly, it must be with lands usually let therewith. 3 *Bac. Abr.* 352.

But now, by the 5 G. 3. c. 17. Whereas it may be doubtful, whether by the laws now in being, archbishops, or bishops, master and fellows, or any other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, or any other person or persons having any spiritual or ecclesiastical promotions, heretofore had, or now have, any power to make or grant any lease or leases of tithes or other incorporeal hereditaments only, which lie in grant, and not in livery, for one, two, or three lives, or for any term or terms of years not exceeding twenty-one, altho' the ancient rent is thereby reserved, and all other requisites prescribed by the acts of parliament now in being to that end, or any of them, were or are justly observed and performed, by reason that there is generally no place wherein a distress can be taken; and it may be also doubtful whether, in cases of leases for life or lives, there is any remedy in law for such persons, by action of debt or otherwise, for recovering the rent in arrear reserved on such leases for life or lives: therefore, for obviating all doubts, and enabling the said persons to make valid leases of such their incorporeal hereditaments, and to recover the rent reserved on leases for one, two, or three lives; and also to make good such leases as have been already granted by them; it is enacted, that all leases for one, two, or three lives, or any term not exceeding twenty-one years, already made and granted, or hereafter to be made or granted, of any tithes, tolls, or other incorporeal hereditaments solely and without any lands or corporeal hereditaments, by any such persons as aforesaid, shall be good and effectual in law, against such persons and their successors, as any lease made by such persons of lands or other corporeal hereditaments by virtue of the statute of the 32 H. 8. or any other act. And if the rent or yearly sum reserved upon such lease shall be behind or unpaid for twenty-eight days; the said lessors, their executors, administrators, and successors respectively may bring action of debt against the lessee, his heirs, executors, administrators, or assigns, for recovering the same, as any landlord or lessor or other person may do for recovering of arrears of rent due on any
9 lease

lease for life, lives, or years, by the laws now in being (e).

By writing indented] It must be by deed indented, and not by deed poll, or by parol. 1 *Inst.* 44.

And if it be not really indented, tho' the words of the deed be *this indenture*, yet still it is not a deed indented; but if the deed actually be indented, it matters not whether it speaks itself to be an indenture or not, it is however a deed indented. *Watf. c.* 42.

In the right of their churches] Yet a bishop that is seised in the right of his bishoprick, a dean of his sole possessions in the right of his deanry, an archdeacon in the right of his archdeaconry, a prebendary, and the like, are within this statute; for every of them generally is seised in *jure ecclesiæ*. 1 *Inst.* 44.

And in general, all sole corporations whatsoever (parsons and vicars only excepted) are included within this statute, and are hereby enabled to bind their successors. Accordingly it hath been adjudged, on several occasions, that precentors, chancellors, and treasurers of churches, are within the benefit of this statute; only, as to precentors, it hath been determined, that tho' there are persons of inferior rank in several churches, who are commonly so called, yet they are not within this statute; but only those dignitaries of that denomination who are properly so called, and who are next to the deans in place and order. *Gibf.* 732. (f)

Unless the same old lease be expired surrendered or ended within one year next after the making of the said new lease] This surrender must be absolute, and not conditional; for the intent of the makers of the act was, to have a continual and absolute surrender, and not such an illusory surrender, which might be avoided the next day. 5 *Co.* 2. (g)

H. 17 G. 2. Wilson on the demise of *Eyre*, clerk, against *Carter* and others. The lessor of the plaintiff, being a prebendary of Sarum, brought an ejectment to avoid a lease made by his predecessor, as not being conformable to this proviso, which requires, that upon renewals, the old

(e) But masters and fellows of colleges, deans and chapters, &c. are disabled from granting leases for any longer term than their statutes allow. *f.* 2.

(f) 4 *Leon.* 51. *Cro. Eliz.* 350. *Palm.* 106. 1 *Les.* 112. *Siderf.* 158.

(g) 3 *Bac. Ab.* 345.

lease must be expired, surrendered or ended, within one year next after making of the new lease. And his objection was, that the *surrender* made of the former lease was with a condition, that if the then prebendary did not within a week after grant a new lease for three lives, the surrender should be void; whereby (as was contended for the plaintiff) the old term was not absolutely gone, but the lessee reserved a power of setting it up again. But the court, after two arguments, gave judgment for the defendants: this being within the intent of the statute, which was, that there should not be two long leases standing out against the successor. Here the new lease was made within the week, and from thence it became an absolute surrender, both in deed and in law. And the whole was out of the lessee, without further act to be done by him. In the proviso in the act, there is the word *ended* as well as *surrendered*; and can any body say the first lease is not at an end? This was no more than a reasonable caution in the first lessee, to keep some hold of his old estate, till a new title was made to him. *Strange* 1201.

Of surrenders in general, the statute of the 29 C. 2. c. 3. enacteth, that no leases estates or interests, either of freehold or terms of years, or any uncertain interest not being copyhold or customary interest of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law. *Id.* 3.

Note, a surrender *by deed*, is a surrender in express words, into the hands of him who hath the immediate remainder: a surrender *in law*, or *by operation of law*, is by taking a new lease of the same estate; for this is an acknowledgment, that the lessor hath power to make such new lease; which power he could not have, but by surrender of the former lease in being. *Gibb.* 733.

Further, with respect to surrenders, it is enacted by the 4 G. 2. c. 28. that whereas many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several under tenants; and whereas many of those leases cannot by law be renewed without a surrender of all the under leases derived out of the same, so that it is in the power of any such under tenants to prevent or delay the renewing of the principal lease, by
refusing

refusing to surrender their under leases, notwithstanding they have covenanted so to do, to the great prejudice of their immediate landlords, the first lessees: therefore for preventing such inconveniencies, and for making the renewal of leases more easy for the future, in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any the under leases, be as good and valid, to all intents and purposes, as if all the under leases derived thereout had been likewise surrendered at or before the taking of such lease. *f. 6.*

And by the 29 G. 2. c. 31. Whereas divers lands tenements and hereditaments, have been and may be granted by lease for the life of one or more person or persons, or otherwise; and whereas, in order to obtain a renewal of such leases, it is in many cases necessary to surrender up the estates thereby granted; which surrenders cannot be effectually made by persons under the age of twenty one years, nor lunaticks, nor by females covert, without levying a fine; it is enacted, that in all cases, where any person so under age, lunatick, or feme covert, shall become interested in or intitled to any lease or leases made or granted by any person or persons, bodies politick, corporate, or collegiate, aggregate or sole, for the life or lives of one or more person or persons, or for any term of years, either absolute, or determinable upon the death of one or more person or persons, or otherwise, it shall be lawful for such person so under age or for his guardian or other person on his behalf, and for such lunatick or his guardian or committee for his estate or other person on his behalf, and for such feme covert or any person on her behalf, to apply to the court of chancery or exchequer, or to the courts of equity of the counties palatine of Chester, Lancaster, and Durham, or the courts of great sessions in Wales, respectively, by petition or motion in a summary way: and by the order and direction of such court, upon hearing all parties concerned, such person so under age, lunatick, or persons appointed by such court, and also such feme covert, by deed or deeds only, without levying any fine, shall be enabled to surrender such leases, and to take new ones, as such court shall direct—And all sums of money and other consideration, paid or advanced by any such guardian, trustee, committee, or other person, for a fine on account of the renewal of such lease, and all reasonable charges incident thereunto,

Leases.

thereunto, shall be paid out of the estate or effects of such infant or lunatick, or be a charge upon the leasehold premises, together with interest for the same, as such court shall direct; and as for leases to be made upon surrenders by females covert, unless the fine or consideration of such lease and the reasonable charges shall be otherwise paid or secured, the same, together with interest, shall be a charge upon the leasehold premises, for the use of such person who shall advance the same.

Within one year next after the making of the said new lease] This, as to sole corporations inferior to bishops, is extended by the 18 *El.* (hereafter following) to three years; and as to bishops themselves, it holds only where they make a new lease without confirmation; for if it be confirmed by the dean and chapter, the years to come, in the old lease, are not material. *Gibf.* 733.

Nor shall extend to any grant to be made of any reversion] That is, such grants as are made to commence at a day to come. *Gibf.* 733.

Nor to any lease of any manors lands tenements or hereditaments, which have not most commonly been letten to farm or occupied by the farmers thereof by the space of twenty years next before such lease made] So that if it be letten for eleven years (lord Coke saith) at one or several times within these twenty years, it is sufficient. 1 *Inst.* 44.

Letten to farm] A grant by copy of court roll in fee for life or years, is a sufficient letting to farm within this statute, for he is but tenant at will according to the custom, and so it is of a lease at will by the common law, but those lettings to farm must be made by some seised of an estate of inheritance, and not by a guardian in chivalry, tenant by the curtesy, tenant in dower, or the like. 1 *Inst.* 44.

Nor to any lease to be made without impeachment of waste] Therefore if a lease be made for life, the remainder to another for life, remainder to a third for life; this is not warranted by the statute, because the remainders make the present tenants punishable of waste: but if a lease be made to one during three lives, this is good; for the occupant, if any happen, shall be punished for waste. 1 *Inst.* 44.

And although this condition of a good lease is not expressed in the statutes of the 1 *El.* and 13 *El.* here next following, for restraining of unreasonable leases (the first of bishops, and the second of the inferior clergy); yet are both bishops and clergy restrained by the equity of the said

said statutes from making leases' dispunishable of waste : for the statutes were made against unreasonable leases; and it is unreasonable, that a lessee shall at his pleasure do waste and spoil. 6 Co. 37. *Gibf.* 733.

Nor to any lease to be made above the number of twenty one years or three lives at the most from the day of the making thereof] There must not be a double lease in being at one time; as if a lease for years be made according to the statute, he in reversion cannot expulse the lessee, and make a lease for life or lives according to the statute; nor e converso: for the words of the statute be, to make a lease for twenty one years or three lives, so as one or the other may be made, and not both. 1 *Inst.* 44.

Or three lives] That is, for three lives, to be all wearing together; and not to one for life, the remainder to a second for life, the remainder to a third for life; which would be a void lease; as it would be, if a lease were let for ninety nine years determinable upon three lives. But a lease to one for the lives of three others, or to three for their three lives, is good. *Gibf.* 733. *Watf. c.* 42.

At the most] It must not exceed three lives or one and twenty years from the making of it; but (according to lord Coke) it may be for a lesser term or fewer lives. 1 *Inst.* 44.

But in the case of *Smartle and Penballow, H. 13 W.* Where the point was, whether a copyhold for one life, where the custom enabled to grant for three, was good, and it was held to be good; Holt chief justice added, This is not like the case of a bishop's lease, which cannot be good for any part, because the statute ties it up to an express form: otherwise perhaps, had it been, that bishops should make leases for any number of years, not exceeding such a number. 1 *Salk.* 188. *Gibf.* 733.

From the day of the making thereof] The statutes of the 1 *El.* and 13 *El.* are *from the making*, and not *from the day of the making*; and the distinction seems to be this: where the habendum is for twenty one years from the making the day of delivery (which is the making) shall be included; but where it is from the day of the making, or from the day of the date, that day shall not be included as part of the term, but the twenty one years shall begin on the day following. *Gibf.* 733. (b)

And

(b) The word "from" has occasioned much controversy in the courts of law; the result of which seems to be that it

And that upon every such lease there be reserved yearly] If the accustomable rent had been payable at four days or feasts of the year; yet if it be reserved yearly payable at one feast, it is sufficient: for the words of the statute be, *reserved yearly.* 1 Inst. 44.

So much yearly farm or rent, or more, as hath been most accustomedly paid for the same] Where not only a yearly rent was formerly reserved, but things not annual, as heriots, or any fine or other profit at or upon the death of the farmer; yet if the yearly rent be reserved upon a lease made by force of this statute, it sufficeth by the expreis words of the act. 1 Inst. 44.

But if a couple of capons, or the like, have been expressly reserved in kind or in money, over and above the rent; a subsequent lease not reserving these shall be void (i): And so it shall be, where all the great trees have been usually excepted, and then are omitted; because by this means every successor cannot have the benefit of boughs and fruits yearly renewing. *Gibf.* 734.

Or more] Therefore if more than the accustomable rent be reserved, it is good, by the expreis letter of the act. 1 Inst. 44.

As hath been most accustomedly paid for the same] If twenty acres of land have been accustomably letten, and a lease is made of those twenty, and of one acre which was not accustomably letten, reserving the accustomable yearly

may be either inclusive or exclusive, according to the subject matter. But the court will construe it so as to effectuate the deeds of parties, and not to destroy them; and therefore, where one under a power reserved in his marriage settlement to lease "for 21 years in possession, but not in reversion, remainder, or expectancy," granted a lease to his only daughter for 21 years, *from the day of the date*, it was adjudged a good lease in possession. *Pugh v. Duke of Leeds, Comw.* 714. where the authorities on both sides are stated by lord Mansfield. So also a lease for lives, to commence *from the date*, shall be construed to include the day of the date, for otherwise the freehold would be conveyed to commence *in futuro*, which cannot be. See *Hatter v. Ash*, 1 Raym. 84. with the authorities cited by Mr. Bayley, where it is said that the words "*from the date*," when used to pass an interest, include the day, *aliter* when used by way of computation only in matters of account. Add, 1 Raym. 220. *Doug. Rep.* 464. And see *Benelice*, VII. 2.

(i) *Hardres*, 325.

rent,

, and so much more as exceeds the value of the other : this lease is not warranted by the act, for that the stomable rent is not reserved, seeing part was not accustomably letten, and the rent issueth out of the whole.

2. 44.

It if tenant in tail let part of the land accustomably, and reserve a rent pro rata, or more, this is good : hat is in substance the accustomable rent. 1 *Inst.* 44.

if two coparceners be tenants in tail of twenty acres, one of equal value, and accustomably letten, and they : partition, so as each have ten acres : they may make s of their severall parts of each of them, reserving the of the accustomed rent. 1 *Inst.* 44.

voided that nothing herein shall extend to give any liberty ver to any parson or vicar] Therefore if either of them : a lease for twenty one years or three lives, of lands tomably letten, reserving the accustomed rent, it must be confirmed by the patron and ordinary : because it is ted out of this act, and not restrained by the statutes e 1 *El.* or the 13 *El.* 1 *Inst.* 44.

By the 1 *El.* c. 19. *All gifts, grants, feoffments, fines or Leases of bi-conveyance, or estates, to be had, made, done, or suffered shope by the disabling statute of the 1 El.*
y archbishop or bishop, of any honours, castles, manors, tenements or other hereditaments, being parcel of the poss of his archbishoprick or bishoprick, or united appertaining belonging to the same; to any person or persons, bodies k or corporate, other than to the crown, (and by the c. 3. not to the crown neither;) whereby any estate or should or may pass from the same archbishop or bishop, than for the term of twenty one years or three lives, from time as any such lease, grant, or assurance shall begin, thereupon the old accustomed yearly rent or more shall be ed and payable yearly during the said term of twenty one or three lives,—— shall be utterly void and of none to all intents, constructions and purposes. l. 7.

[*gifts, grants, &c.*] Neither this act, nor that which vetn, of the 13 *El.* c. 10. which are called the dis- acts, nor any other act or statute whatsoever, do y sort alter or change the *inabling* statute of the 32 aforesaid; but leave it for a pattern in many things, ases to be made by others. And no lease made acc- to the limitations of this statute of the 1 *El.* or of 3 *El.* here next followings, and not warranted by the e of the 32 *H.* 8. if it be made by a bishop or any sole ration, but it must be confirmed by the dean and

chapter, or others that have interest; as hath been said in the case of the parson and vicar. 1 *Inst.* 44, 45.

Gifts, grants, feoffments, fines or other conveyance, or estates] Neither bishops by this act, nor other ecclesiastical or collegiate corporations by the said act of the 13 *El.* are restrained from making grants of *copyholds* in fee, in tail, or for lives, or for any number of years, according to the custom of the manor; nor is confirmation necessary to make such grants good, though it be made by a sole corporation, as by bishop, prebendary, or the like. *Watf. c.* 42. 4 *Co.* 23, 24.

Of any benefices, castles, manors, lands, tenements, or other hereditaments] The general design of this statute being in favour of the successor, to preserve bishopricks from impoverishment; it hath been extended, in equity and intention, to a prohibition of the grants of new *offices* (tho' not directly included in any of the foregoing terms). For if a bishop might erect new offices at pleasure, and assign salaries to the officers, and then make grants to bind his successors, the end of the statute would be manifestly defeated. The same thing is to be said of the augmentation of the fee or salary belonging to an ancient office; which power of augmentation (for the same reason) is also restrained; as, when the keepership of a park was granted with the ancient fee, and also with pasture for two horses in the same park, this was void: and it hath been said, that if the ancient fee was less than 5*l* and a grant is made with a fee of 5*l* intire, the whole grant is void, as well for the ancient fee, as the overplus: but if the office, and the ancient and new fee, are as several grants, in several sentences; the grant is good for the office and ancient fee, and void only for the new. *Gibf.* 735. (t)

But, saith my lord Coke, if the office hath been ancient and necessary, the grant thereof, with the ancient fee, is not any diminution of the revenue, nor impoverishing of the successor: and therefore, for necessity, such grants are by construction exempted out of the general restraint of this act. And as to granting it for the life of the grantee, he adds, If bishops should not have power to grant such offices of service and necessity for the life of the grantees, but that their estates should depend upon uncertain-

(t) *Cro. Car.* 47. *Bishop of Cologier v. Freeland.* S. C. 247.

ties, as upon the death or translation of the bishop: then able persons would not serve them in such offices, or at least would not discharge their office with any alacrity, if they have not such certain estates for their lives, as their predecessors had in the same offices. 1 Inst. 44. 10 Co. 61.

However, this equity of granting for life amounts to no more than for one life; and therefore where a bishop grants an office for two or more lives, it must be upon the foot of custom, that is, because such patent hath usually been for two or more lives, and had been so granted before the present act was made. For this is the great rule; and in this, there is no difference between bishopricks of the old and of the new foundation; since the new as well as old are capable of coming under this rule. *Gibf.* 735. (l)

The same is the law, and the reason of it, concerning grants of offices in reversion (that is, to have and enjoy such office, after the death of the present grantee for life;) for there can be no pretence, that such second grant is necessary, or for the advantage of the bishoprick; and therefore nothing can make it legal but custom, and particularly, instances, or an instance, of such grant, before the making of the statute. *Gibf.* 735. (m)

But to the end that unquestionable grants of ancient established offices, may be good against the successor of a bishop; they must in the first place be grants of one office singly; for two offices, which have been usually granted apart, cannot be granted by one patent, though to the same person: and in the next place, they must be confirmed by the dean and chapter (though they be but for one life), because they are grants at common law and not warranted by this statute; and must therefore pass as they usually did at common law before this statute. *Gibf.* 735. (n)

In like manner, the grants of new offices (if of necessary use to the bishop), and of new fees annexed to such offices, shall be good, and bind the successor; as was declared in the case of the bishop of Ely, who granted the keeping of his house and garden, with 3 l a year, to one

(l) *Cro. Car.* 258. *Walker v. Sir John Lamb.*

(m) *Cro. Car.* 555. *Young v. Fowler.* 10 *Rep.* 62. and see *Co. Lit.* 3. b. note 5. *Dyer* 80. *Ed. Vail.*

(n) *Cro. Eliz.* 636. *Scamblaw v. Waters.* *Cro. Car.* 50.

for

for life; and it was adjudged to be good against the successor, because the office was necessary, and the fee thought reasonable by the court. But on the other hand, where the foundation of the grant to a civilian for life, was, for counsel given and to be given, and an annual pension was annexed to the office; judgment was given against the grant, as not binding the successor, tho' it was alledged to be the ancient fee; because this was a voluntary thing, to make an election of one man to be of his counsel, and not an office; and peradventure the next bishop would not make such election. *Gibf. 735. (o)*

But notwithstanding all that hath been said concerning the necessity of the office, it hath been determined upon solemn hearing, that the necessity of the office is not at all material. Thus in the case of *Sir John Trelawney* and the bishop of *Winchester*, *H. 30 G 2. (p)* Lord Mansfield chief justice delivered the resolution of the court.—The plaintiff brings his action of debt to recover 500 l, being for five years arrears of a salary of 100 l a year, for executing the offices of “great and chief steward of the bishop, and of *conductor tenentium* of the bishop,” and as a fee annexed to those two offices.

This comes before the court upon a special verdict, the material facts of which are, that these offices are ancient offices, and existed before the statute of the 1 *Edw.* and that they have been granted in the usual manner, and with the ancient fee; that bishop Trelawney by indenture granted this office to the plaintiff his eldest son for life; that the dean and chapter confirmed this grant; that every bishop since hath paid to the plaintiff this fee of 100 l a year, and that the defendant paid it for eleven years after he came to the bishoprick; and that this action is brought for five years accrued since: but the jury further find, that these several offices, at the time of making the said statute were, and ever since have been, and still are, offices merely nominal; and that no duty, service, work or labour, attendance or business, ever was or is done in respect of these offices, as the defendant hath in his plea alledged.

This is the only doubt which the jury have; and upon this fact the whole question depends.

This case hath been argued several times; and we are all of the opinion which I shall now give.

(o) *Ley 75.*

(p) 1 *Burr.* 219.

At common law the bishop, with the confirmation of the dean and chapter, might exercise every act of ownership over the revenue of the see, and might bind his successors in the same manner as every tenant in fee might bind his heirs. The statute was made in restraint of this power. But patents or grants of offices, with the fees or the privileges annexed to them, are not mentioned therein; nor are there any general words adapted to the case of offices. And yet there were not any bishopricks in the kingdom at that time, but what had some ancient offices annexed to them, granted by the bishop. Had the legislature meant to restrain the granting of these offices, there must have been a special provision in the statute; and as the general restraint is not extended to offices, there was no reason to make the exception. Their continuing ancient offices was no injury or dilapidation to the bishoprick. They brought no new charge upon the successor; and he accepted the bishoprick charged with these offices as his predecessor had done, and the office and bishop continued subject to the same ancient fee.

The act had no retrospect. It was made on the 23d of January in the 1 Eliz. The bishop of *El's* case, *H. 10 Eliz.* (Ley's Rep. 78.) proves that the statute doth not extend to the grant of an office; where an annuity was recovered against the successor, upon the grant of the keeping of the bishop's house in Holborn, with the fee of 3l: which grant was made after the beginning of the parliament, to which the act hath reference, to wit, on the 20th of April in the first of Eliz. This was a grant of a new office with a new fee, made the very year the act took place; and yet was held to be good, as not being restrained by the statute. It was extraordinary, if it was thought that the office of taking care of a house was necessary; it was also extraordinary, to hold the fee of 3l a year a reasonable fee, which considering the value of money at that time would amount to 30l a year now; and as extraordinary, as it was the grant of an office which never subsisted before: but the true ground was, the court did not think the grant of such offices within the statute.

T. 30 Eliz. Bolton's case, (cited *Ley* 75. 10 Co. 60.) When the bishop of Chester, after the said statute, granted to Bolton an annuity of five marks for counsel given and to be given, which was confirmed by the dean and chapter, the bishop died, and Bolton brought a writ of annuity against the successor; the plaintiff had no judgment, but the reason of that case was not that the office was within the statute, but that it was no office at all, but a voluntary thing

thing to make election of one man to be his counsel, and that the grant of the salary was an alienation of the revenue of the bishoprick.

In the case of the archbishop of *Canterbury*, 43 *Eliz.* (cited in *Ley* 75.) the true distinction is taken: the archbishop granted the office of surveyor with the ancient fee, to a parker: and further he granted to him pasture for two horses in a park: and the whole grant was adjudged void. This judgment was grounded upon the new addition made to the ancient fee.

The statute of 1 *Ja. c. 3.* extends this same restraint to the kings, which by the 1 *Eliz.* was laid upon the subject. Yet the legislature did not interpose then in this case of granting ancient offices; and therefore we may presume they were satisfied that the bishop should continue to have this power.

10 *Co. 58.* The bishop of *Salisbury's* case came next in point of time.

From the 10 *Eliz.* to this day, no grant of a new office by a bishop with a new fee has been held good. Such a grant is within the 1 *Eliz.* by construction; for it is a colourable alienation. But a grant of an ancient office with an ancient fee is not within that statute, but remains at common law. And if such a grant is not within the statute, but stands as at common law; the utility or necessity of the office cannot be material. And there is no case since the 10 *Eliz.* that has turned upon these: the only questions have been, whether the grants were within the statute.

In the said case of the bishop of *Salisbury*, it is not alleged in the pleadings, that the office was necessary. The fifth resolution in this case (10 *Co. 62.*) is very material: Resolved, that the grant of an ancient office to one with an ancient fee, by a bishop, shall not bind his successor, unless confirmed by the dean and chapter: for such grants are not restrained by the statute of the 1 *Eliz.* and therefore remain as at the common law, and by consequence ought to be confirmed by the dean and chapter.

If such grants remain as at the common law, the necessity of the office cannot be material.

In the case of the bishop of *Chichester* and *Prebendary*, 1 *Car.* (Cro. Car. 47.) There were no allegations in the pleadings, whether the offices were necessary or not.

In the case of *Young* and *Fowler*, 14 *Car.* (Cro. Car. 557.) Upon a special verdict, the jury do not find that the

office (of register) was a necessary office: the question turned upon the grant in reversion.

Thus stood the construction, upon the reason, the words, and the practice of making these grants, until the 24 Car.

But besides the real ground upon which the case in 10 Co. 60. was determined; the counsel ex abundanti laboured to prove that the office was necessary; but the arguments are so confused and inconsistent, that it is difficult to understand them.

In real truth, few of these offices (except judicial ones) are useful or necessary in any respect. None of them can be granted in reversion, unless they existed before the 1 Eliz. and then they remain as at common law; and however unnecessary they were, will bind the successor.

The case of *Ridley and Pownal*, 27 Car. 2. (2 *Lon.* 136.) is the first case wherein it appeared to the court judicially, that the office was necessary. But my lord Hale, who understood what he read, and clearly distinguished, made no distinction upon the necessity of the office.

In the case of *Jones and Bean*; 4 *Mod.* 16. The issue out of chancery was, whether the office had been granted to two, before the statute of the 1 Eliz. but there is not a word whether necessary or not.

The present office is found never to have been more useful than at present; and yet the predecessors of the bishop have thought the grants of it valid, and have granted it to some of the greatest men in the kingdom, who accepted it as valid; and the succeeding bishops acquiesced, until the present bishop conceived a doubt thereupon.

Upon the whole, we are unanimously of opinion; First, this being an ancient office, which existed before the statute, that it is not within it. And secondly, that the utility or necessity of the office are not material: and this opinion we think agreeable to every judicial determination since the making of the said statute.

* Sir John's grant was, to hold in as ample manner, as Richard earl of Portland, Thomas Cary, George duke of Buckingham, Charles earl of Nottingham, Thomas duke of Norfolk, Philip earl of Pembroke and Montgomery, James duke of Ormond, or Henry earl of Clarendon had holden. *Burrow*, 225.

Whereupon the old accustomed yearly rent or more shall be reserved] It was held by Hale chief justice, that the accustomed rent mentioned in this statute and in the following statute of the 13 *El* ought to be understood of the rent reserved upon the last lease, and not upon the first; for that rent having been altered since, cannot be called the accustomed rent. *Gibf. 736. (9)*

Rent] For this reason, a grant of the next avoidance of a benefice, is void against the successor: because it is one of those things which are incorporeal, and lie in grant only, and such an interest, out of which a *rent* cannot be reserved. *Gibf. 736.*

Shall be utterly void] Forasmuch as this and the said statute of the 13 *El.* make all such leases other than for the term of twenty one years or three lives to be utterly void; therefore, generally speaking, at this day, no ecclesiastical or collegiate person, or corporation, can *alien* any of their manors lands or tenements, by any ways or means whatsoever; for tho' before these statutes they might have aliened, yet by the said statutes they are now restrained. *Watf. c. 42.*

However by the 14 *El. c. 11.* (hereafter following) all but bishops, that is, all those who are restrained by the 13 *El. c. 10.* have some liberty given them as to alienating of *houses* mentioned in the said statute of the 14 *El.* But this seems to be restrained to such houses only, as by the said statute may be let for forty years, namely, to houses in cities boroughs or market towns. *Watf. c. 42.*

But by the 1 *G. 2. c. 10.* in case of lands or other estates purchased for the augmentation of small livings by the governors of queen Anne's bounty, exchanges may be thereof made by the concurrence of the governors, incumbent, patron and ordinary; for any other estate in lands or tithes, of equal or greater value. */f. 13.*

And it is said, that if a parish be upon the design of inclosing, and a parson hath tithes in kind, and common for beasts in the fields, a decree may be had in chancery, that he shall take a quantity of ground in lieu thereof. *Watf. c. 42.*

However, an act of parliament will do this; and this is the usual way; namely, in the special acts for the dividing and inclosing of heaths, wastes, commons, common fields, and the like, to insert a clause for a recom-

pence to be given to the incumbent for his right of common, or tithes, or otherwise as the case shall be.

Shall be utterly void and of none effect] Yet they are good against the lessor, if it be a sole corporation : or so long as the dean or other head of the corporation remaineth, if it be a corporation aggregate of many : for the statute was made in benefit of the successor. 1 *Inst.* 45.

To all intents constructions and purposes] Nevertheless, the acceptance of rent by the successor, may affirm a lease (otherwise voidable) for his own time. *Gibf.* 745.

It is indeed regularly true, that where the successor accepts a rent after the death of the predecessor, upon a void lease made by the predecessor, that such acceptance will not affirm the lease; but this rule must be understood of such a lease as is void ipso facto, without entry or any other ceremony; and therefore if a parson vicar or prebendary make a lease not warrantable by the statutes, for twenty one years, rendering rent, and dies, here no acceptance of rent by the successor will affirm this lease, because the same was void without entry or other ceremony: but if a parson vicar or prebendary make a lease not warrantable within the before-mentioned statutes, for life or lives, reserving rent, and dies, and the successor before entry accept the rent; this lease shall bind him for the time, for this being an estate of freehold could not be void before entry. *Degge, p. 1. c. 10.*

But if a bishop, which hath the inheritance in fee simple in him, make a lease for lives or years not warranted by the said statutes, not being absolutely void by his death, but only voidable by the entry of the successor; if the successor accept the rent before entry, be it for lives or years, he affirms the lease for his life. *Id.*

But wheresoever the acceptance of rent binds, whether a sole or aggregate corporation, it must, in order to such binding, appear to be their own act; and therefore in such case, if the bailiff of a bishop accepts the rent, without order, this binds not the bishop. But if he acquaints the bishop that several rents are in arrear, and has an order from him to receive them, and receives (among others) the rent of a voidable lease, and pays all the rents to the bishop, without giving him notice of the said voidable lease, this hath been judged such an acceptance as affirms a lease; because the bishop of himself ought to take notice what leases were made by his predecessor. *Gibf.* 745. (r)

In like manner, with regard to a corporation aggregate; where the master of a college accepted rent, having no express authority from the corporation to accept it; it was adjudged, that this did not affirm a voidable lease, during the continuance of such master; because the act of the head singly, cannot divest the members of their right. *Gibf. 746.*

But no acceptance of rent by the successor availeth (as hath been said) where the lease is absolutely and ab initio void. *Gibf. 746. (1)*

And in what cases a voidable lease may be affirmed by the acceptance of rent; in the same it may be affirmed by dis-
training, or bringing an assise for rent, after the death of the predecessor; and also, by bringing an action of waste against the lessee. *Gibf. 746.*

Leases of other corporations, sole and aggregate, by the disabling statute of the 13 El. and other statutes.

4. By the 13 El. c. 10. *All leases gifts grants scissments conveyances or estates, to be made had done or suffered, by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other having any spiritual or ecclesiastical living, of any houses lands tithes tenements or other hereditaments, being any parcel of the possessions of any such college, cathedral church, chapel, hospital, parsonage, vicarage, or other spiritual promotion, or any ways appertaining or belonging to the same: to any person or persons, bodies politick and corporate, (other than for the term of one and twenty years, or three lives, from the time as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved and payable yearly during the said term,) shall be utterly void and of none effect to all intents constructions and purposes. l. 3*

Provided, that this shall not be construed to make good any lease or other grant to be made by any such college or collegiate church within either of the universities of Oxford or Cambridge, or elsewhere within the realm of England, for more years than are limited by the private statutes of the same college. l. 4.

And by the 18 El. c. 11. it is enacted as follows: *Whereas since the making of the said statute of the 13 El. c. 10. divers of the said ecclesiastical and spiritual persons and others having spiritual or ecclesiastical livings, have made leases for twenty one years or three lives long before the expiration of the former years, contrary to the true meaning and intent of the*

(1) Cro. Jac. 173. *Rickman v. Garth. Co. Lit. 45. b.*
said

said statute; it is enacted, that all leases to be made by any of the said ecclesiastical spiritual or collegiate persons or others, of any their said ecclesiastical spiritual or collegiate lands tenements or hereditaments, whereof any former lease for years is in being, not to be expired surrendered or ended within three years next after the making of any such new lease, shall be void frustrate and of none effect. §. 2.

The said act of the 13 El. not to extend to any lease to be made of the manor of Fifeild in the county of Berks, by St. John's college in Oxford, to the heirs male of Sir Thomas White founder of the said college. §. 5, 6.

All leases, gifts, grants, &c.] Corporations aggregate might always let long leases without any confirmation; and so might sole corporations, with confirmation, until this act was made; none but bishops being restrained by the 1 El. c. 19. But by this statute, all other corporations, sole and aggregate, are put under the same restraints that bishops were; and the two acts being of the same tenor and form, what hath been observed upon the former act will help towards the right understanding of several clauses in this act also.

By any master and fellows of any college, dean and chapter of any cathedral or collegiate church] That is to say, by the major part of such body corporate: in regard whereunto, it is thus enacted by the 33 H. 8. c. 27. viz. Albeit that by the common law all assents elections grants and leases, had made and granted, by the dean warden provost master president or other governor of any cathedral church hospital college or other corporation, with the assent of the major part of their chapter fellows or brethren of such corporation, be as effectual as if the residue of the whole number had assented; yet nevertheless divers founders of such corporations have amongst other their local statutes established, that if any one of such corporation should deny any such grant, that then no such lease election or grant should be made, and for performance of the same every person having power of assent hath been wont to be sworn; for remedy thereof, it is enacted, that all and every peculiar act order rule and statute made by any such founder, whereby the grant lease gift or election of the governor or ruler, with the assent of the more part of such corporation, should be in any wise hindered by any one or more being the lesser number (contrary to the course of the common law), shall be void; and none shall be compelled to take an oath for the observing of any such order rule or statute,

on pain of every person giving such oath to forfeit 5*l*, half to the king, and half to him that shall sue in any of the king's courts of record.

But such major part are to attend in person, and to be present together at the executing of such act: thus in the case of the dean and chapter of *Fernes in Ireland*, which was concerning the confirmation of a lease made by the bishop; it was adjudged, that the confirmation was ill, because the dean was not only not present, but acted by a proctor, who was a *stranger* to the chapter, and not of the body. Agreeable to which are the rules of the civil law, that he shall make no deputation in such a case but to one of the chapter only.

And in the same case it was said further, upon the authority of the year books, that neither would this, nor any other act that had charged the revenues of the church, have been good, tho' the dean had done it by one of the chapters *as his commissary*; for (as is there alledged) tho' the dean may have his president or commissary to execute his spiritual jurisdiction, yet such commissary cannot charge the possessions of the church. And therefore besides the authority of the president, sub-dean, or the like, for the exercise of the decanal office; a distinct proxy to one or more members of the chapter, who may represent him in the passing of grants, confirmations, and other chapter acts, is necessary to make them good and valid in law.

And their assent must be given by each member singly; and not in a confused and uncertain manner; and this must be, when they are capitularly assembled in one certain place; and not a consent given by the members, in several places, and at several times. Which was the case of the last cited act of the dean and chapter of *Fernes*. The chapter consisted of ten persons, and only three were present (together with the dean's proctor), when the chapter seal was fixed to the confirmation; afterwards three others of the prebendaries subscribed it: and this was adjudged ill, as being the act of particular persons only, and not of the corporation, by reason they were not assembled in one place, and in a capitular manner, that is, the act was not done *simul et semel*, at the same time and place, as the law requires.

But it was there agreed and acknowledged, that in such the dean and chapter be capitularly assembled in *any place*, their acts shall be good, tho' such assembly is not held in the *chapter-house*; and the act of the dean and major part of the chapter, so assembled, is properly the act of the corporation,

poration, altho' the rest do not agree, or be absent thro' their own default. *Gibf.* 744. *Dav.* 42.

Master and fellows of any college] This includes all colleges, by what name soever incorporated, and of what nature soever the foundations be, ecclesiastical, temporal, or mixed: the statute being construed most largely and beneficially, against long and unreasonable leases. 11 *Co.* 76.

Dean and chapter of any cathedral or collegiate church] For the same reason, tho' it is said dean and chapter, it extendeth to chapters where there are no deans. *Gibf.* 736. (1)

Master or guardian of any hospital] In like manner, this shall extend to all manner of hospitals, be the hospital incorporated by any other name; or be it a sole corporation, or corporation aggregate. 11 *Co.* 76.

Or any other having any spiritual or ecclesiastical living] That this is a *general* law, as it concerns all the clergy, hath been often declared and adjudged, tho' at first much doubted. But it was always agreed, notwithstanding this general clause, that bishops were not included; because the statute begins with an order inferior to them. *Gibf.* 772. (2)

Of any houses] But by the 14 *El. c.* 11. *f.* 17. This shall not extend to any grant assurance or lease of any houses belonging to any persons or bodies politick or corporate aforesaid, nor to any grounds to such houses appertaining, which houses be situate in any city borough town-corporate or market town or the suburbs of any of them; but that all such houses and grounds may be granted demised and assured, as by the laws of this realm, and the several statutes of the said colleges cathedral churches and hospitals, they lawfully might have been before the making of the statute of the 13 *El.* or lawfully might be if the said statute were not; so alway that such house be not the capital or dwelling house used for the habitation of the persons aforesaid, nor have ground to the same belonging above the quantity of ten acres. Provided, that no lease of any such houses shall be permitted to be made by force of this act in reversion, nor without reserving the accustomed yearly rent at the least, nor without charging the lessee with the reparation, nor for longer term than forty

(1) 1 *Mod.* 204.

(2) 4 *Rep.* 76. 1 *Mod.* 205. *Jov.* 129.

years at the most ; nor any houses shall be permitted to be aliened, unless that in recompence thereof there shall be good lawful and sufficient assurance made in fee simple absolutely to such colleges houses bodies politick or corporate and their successors, of lands of as good value, and of as great yearly value at the least, as so shall be aliened ; any statute to the contrary notwithstanding. *f. 17, 19.*

But this statute also, referring only to *such persons or bodies corporate as were specified in the statute of the 13 El.* doth not extend unto bishops, but the *1 El.* remaineth as it did ; and bishops have no power to let houses, otherwise than according to the said statute of the *1 El.* nor may they make exchanges, for any recompence or consideration. But altho' the bishops are not included, yet this is a general law, as extending to all the other clergy. *Gibf. 738.*

And by the exprefs words of the act, no lease of any such houses shall be made *in reversion* : for which reason, when the dean and chapter of St Paul's made a lease of a house for forty years, which house was then in lease for ten years to come, to a stranger ; it was adjudged, without argument, not to be a good lease, because in reversion : but otherwise, if both leases had been to the same person ; because the acceptance of the second lease by the lessee would have made the first lease void. *Gibf. 739. Cro. El. 564.*

Olbr than for the term of one and twenty years or three lives] Although ecclesiastical corporations aggregate are not within the statute of the *32 H. 8.* yet is that statute (as hath been said) a pattern for leases by them made, in many things which are not here specified. And as to leases made by *sole corporations*, according to this statute, they are not good without confirmation, unless they be also made according to the limitations of the said statute of the *32 H. 8.* *Gibf. 736.*

Shall be utterly void and of none effect] If a corporation aggregate makes a lease not warranted by this statute, such lease is void against themselves ; but nevertheless if a sole corporation maketh such lease, it shall bind himself, tho' it be void against his successor. *Gibf. 737. (w)*

Divers of the said ecclesiastical and spiritual persons and others] Which words of the statute of the *18 El. c. 11.*

(w) *Per Hale, C. B. in Morice v. Ambrose, Hardres 326. Co. Lit. 45. a.*

referring also to the same persons or bodies corporate which were particularly enumerated in the said statute of the 13 *El.* c. 10. it is plain, that this statute likewise extendeth not to bishops, but they still remain, as they stood at first, upon the statute of the 1 *El.* c. 19. Therefore if a bishop makes a lease for twenty one years, and more than three of those years are unexpired (for the number of years to come in such case is not material, this statute of the 18 *El.* not extending to bishops), yet this concurrent lease is good; but then it must be confirmed by the dean and chapter, because it is not warranted by the statute of the 32 *H.* 8. Also deans (in their sole capacity), prebendaries, heads of colleges, masters of hospitals, and the like, may make concurrent leases as bishops may, with confirmation: but they must by this statute be within three years of the determination of the former term by expiration surrender or otherwise; so that in this point the bishop hath the advantage. *Wood. b. 2. c. 3. Degg. p. 1. c. 10.*

But in all cases where concurrent leases are made, the new lease, altho' it may be made *a die confessionis*, is not to take effect in interest till the old lease be expired surrendered or ended, that is, the new lessee cannot enjoy the land till such time; for the new lease doth commence presently by estoppel only, not in interest; yet it seems that the rent is due from the first commencement of the lease, so that the bishop or other being lessor is entitled to two rents, and may bring an action of debt to recover the rent reserved upon the second lease, during the continuance of the former; for the rent must be reserved and made payable during the term, and not from the determination of the former lease, else such concurrent leases will be void, as contrary to the statute. *Watf. c. 42. (x)*

But where the second lease is made to the same person to whom the former lease was made, and not to a stranger; it seemeth that the former lease is wholly vacated by the

(x) That concurrent leases are good under the proviso of a private settlement "to lease only for 21 years," as well as in the case stated by the author, and that they were valid under the 13 *Elix.* till restrained by the 18 *Elix.* See *Read v. Nash*, 1 *Leon.* 148. and *Fox v. Collyer*, 1 *Andersf.* 65. cited and agreed in 2 *Doug. Rep.* 373. *Ed. 3. Goodtitle v. Funacan.* The reason being that the inheritance is not charged upon the whole with more than 21 years.

Bonds and judgments to defraud the said Statutes.

same person accepting the concurrent lease. *Wals. c. 44. Cro. Eliz. 564. Gibf. 739. 5 Rep. 11. b.*

5. By the 14 *El. c. 11.* Whereas sundry persons have defrauded the true meaning of the aforesaid statute of the 13 *El. c. 20.* by bonds and covenants of suffering other persons to enjoy ecclesiastical livings, for that such bonds and covenants are not in law taken to be leases, alibe indeed they amount to as much; it is enacted, that all bonds contracts promises and covenants, for suffering any person to enjoy any benefice or ecclesiastical promotion with cure to take any profits or fruits thereof, other than such bonds and covenants as shall be made for assurance of any lease heretofore made, shall be to all intents and purposes adjudged of such force and validity, and not otherwise, as leases by the same persons made of such benefices, and ecclesiastical promotions with cure. *s. 15.*

And by the 43 *El. c. 9.* All judgments to be had for the intent to have or enjoy any lease contrary to the statute of the 13 *El. c. 20.* or any other statute explaining or altering the same, shall be deemed void in such sort as bonds and covenants are appointed to be void, which are made for that purpose. *s. 8.*

Upon which two statutes the rule is this: Where leases are made void by the 13 *El. c. 20.* there all bonds covenants and judgments for the enjoying such leases, are made void by these statutes; but if the leases be void at the common law, as by death resignation or deprivation, and not by the statute of the 13 *El. c. 20.* their bonds and covenants for the enjoying of such leases are not made void by either of these statutes (y).

Where the covenant was, that the lessee should enjoy a rectory for three years, without expulsion, or any thing done or to be done by the lessor; which lessor omits to read the articles, and so is ipso facto deprived, and the lease void; in such case, the obligation is not forfeited, because this happeneth not by any act of the lessor, but by non feoffance, and so not within the covenant: but otherwise it would have been, if the lessor had covenanted, not to omit the doing of any thing. *Gilf. 740. (z)*

And by the 18 *El. c. 11.* it is enacted, that every bond and covenant for renewing or making of any lease or leases contrary to the true intent of the said act of the 18 *El. c. 11.* or of the act of the 13 *El. c. 10.* shall be utterly void. *s. 3.*

(y) *Infra, Rudge v. Thomas.*

(z) 4 *Leon. 38.*

T. 14 Jac. Rudge and Thomas. A parson covenanted with another, that he should have his tithes for thirteen years; afterwards he resigned, and another parson was inducted; the lessee brought an action of covenant against the lessor, and the defendant pleaded this statute of the 18 *El. c. 11.* in bar. But Coke, Doderidge, and Haughton agreed, that the covenant was not made void by this statute; which was only intended to void bonds and covenants contrary to the statute of 13 *El.* but doth not extend to bonds and covenants made for the enjoyment of leases which become void by the common law, as leases do by resignation, or the like. 3 *Bullst.* 202. *Gibf.* 737.

But when a dean and canons made bonds among themselves, to ascertain to each other the benefit of particular leases, and the whole body engaged, under such and such forfeitures, to make the leases respectively as there should be occasion; such bonds were declared to be void by this statute. And so it was, where the dean and chapter obliged themselves to make to one a lease of lands which were then in lease to another for fifteen years to come; the covenant was declared void, upon this statute. *Gibf.* 738. (a)

6. *For the better maintenance of learning, and the relief of scholars in the universities of Cambridge and Oxford, and the colleges of Winchester and Eaton; no master provost president warden dean governor rector or chief ruler of any college cathedral-church hall or house of learning in any of the universities aforesaid, nor any provost warden or other head officer of the said colleges of Winchester or Eaton, nor the corporation of any of the same by what title style or name soever they shall be called, shall make any lease for life or lives or years of any farm or any their lands tenements or other hereditaments, to the which any tithes arable land meadow or pasture doth or shall appertain; except that one third part at the least of the old rent be reserved and paid in corn, for the said colleges cathedral-church halls and houses; that is to say, in good wheat after 6 s 8 d a quarter or under, and good malt of 5 s the quarter or under, to be delivered yearly upon the days prefixed, at the said colleges cathedral-church halls and houses: and for default thereof, to pay to the said colleges cathedral-church halls or houses in*

Further regulations as to college leases.

(a) *Morr.* 789. But this statute does not avoid bonds and covenants touching leases of houses in cities, boroughs, corporations or markets, according to the stat. 14 *Eliz. c. 11. s. 17.* *Vid. sup. Gib. Cod.* 738. *Hob.* 269.

ready money at the election of the said lessors their executors administrators and assigns after the rate of the best wheat and malt in the market of Cambridge, for the rents that are to be paid to the use of the house or houses there; and in the market of Oxford, for the rents that are to be paid to the use of the house or houses there; and in the market at Winchester, for the rents that are to be paid to the use of the house or houses there; and in the market at Windsor, for the rents that are to be paid to the use of the house or houses at Eaton,—is or shall be sold at the next market day before the said rent shall be due, without fraud: and all leases otherwise to be made, and all collateral bonds or assurance to the contrary, by any of the said corporations, shall be void in law: The same wheat malt or money coming of the same, to be expended to the use of the relief of the commons and diet of the said colleges cathedral-church halls and houses only, and by no fraud or colour let or sold away from the profit of the said colleges cathedral-church halls and houses, and the fellows and scholars in the same, and the use aforesaid; upon pain of deprivation of the governor and chief rulers of the said colleges cathedral-church halls and houses, and all other thereunto consenting. 18 El. c. 6. s. 1.

But this shall not extend to any lease to be made by the president and scholars of St. John Baptist's college in Oxford, to any heir male of Sir Thomas White, late knight and alderman of London, founder of the said college; which lease shall be made, according to the meaning of the foundation and statutes of the said college, of the manor of Fifield, and no other beneficements. s. 3.

For the better maintenance of learning, &c.] Dr. Kennet says, the memory of Sir Thomas Smith is highly to be honoured for promoting this act, which provideth that a third part of the rent be reserved in corn, payable either in kind or money, after the rate of the best prices in the market. For if a certain rate thereof had been fixed in money instead of corn, it would have been highly prejudicial to the colleges, the value of money abating, as the value of land and of the produce thereof advanceth. This worthy knight is said to have been engaged in this service, by the advice of Mr. Henry Robinson, soon after provost of queen's college in Oxford, and from that station advanced to the see of Carlisle. *Ken. Par. Antiq.* 605.

To the which any tithes arable land meadow or pasture doth or shall appertain] T. 26 El. *Hayes and Fillingbridge*. The question was, whether this should be intended of tithes of corn only, or also of tithes of money, or the like,

as in London, where money is paid as the tithe of houses ; and it was adjudged by Manwood chief baron, in the absence of Shute, that it is to be intended of tithe corn. For the parliament never meant, to cause those farmers to pay corn, but where they had corn or land that beareth an annual crop, as arable, meadow, or pasture ; and not of wood, heath, marsh, or the like. But afterwards a writ of error was brought. *Sav. 68. Gibf. 742.*

7. That the livings appointed for ecclesiastical ministers may not by corrupt and indirect dealings be transferred to other uses ; no lease to be made of any benefice or ecclesiastical promotion with cure, or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be ordinarily resident, and serving the cure of such benefice, without absence above fourscore days in any one year ; but every such lease, immediately upon such absence, shall cease and be void ; and the incumbent so offending, shall for the same lose one year's profit of his said benefice, to be distributed by the ordinary among the poor of the parish. 13 El. c. 20. s. 1. And after complaint made to the ordinary, and sentence given upon such offence ; he shall, within two months after such sentence given and request to him made by the churchwardens of the said parish or one of them, grant the sequestration of the profits of such benefice, to such inhabitant or inhabitants within the parish where such benefice shall be as to him shall seem meet : and upon default therein by the ordinary, it shall be lawful to every parishioner to retain his tithes, and likewise for the churchwardens to enter and take the profits of the glebe lands and all other rents and duties of every such benefice, to be employed to the use of the poor as aforesaid, until such time as sequestration shall be committed by the ordinary ; and then as well the churchwardens as parishioners to yield account thereof, and to make payment to him or them to whom such sequestration shall be committed ; and such sequestrator shall justly and truly employ and bestow the said profits or the value thereof, to such uses as by the said statute of the 13 El. c. 20. is limited ; on pain of forfeiting double value of such witholden profits, to be recovered in the ecclesiastical court by the poor of the said parish. 18 El. c. 11. s. 7.

And all charging of such benefices with cure as aforesaid, with any pension, or with any profit out of the same to be yielded or taken, other than rents to be reserved upon leases hereafter to be made according to the meaning of the said statute of the 13 El. c. 20. shall be utterly void. 13 El. c. 20. s. 1. 14 El. c. 11. s. 14.

Provided,

How leases of
benefices with
cure become
void by non-
residence.

Provided, that every parson by the laws of this realm allowed to have two benefices, may demise the one of them upon which he shall not then be most ordinarily resident, to his curate only, that shall there serve the cure for him; but such lease shall endure no longer than during such curate's residence, without absence above forty days in any one year. 13 El. c. 20. f. 2.

And all leases bonds promises and covenants of and concerning benefices and ecclesiastical livings with cure, to be made by any curate, shall be of no other nor better force validity or continuance, than if the same had been made by the beneficed person himself that demised or shall demise the same to any such curate. 14 El. c. 11. f. 16.

That the livings appointed, &c.] This statute was intended to prevent corrupt bargains between patron and clerk; it being at that time a practice for patrons to get some unworthy clergyman to take institution to their vacant benefices, upon condition of having leases of those benefices made to themselves at very low rates; by which means these patrons secured the main of the benefices to themselves, and got them served at any rate by stipendiary curates, while the incumbents were non-resident and making their fortunes elsewhere: so that the statute was not primarily designed against non-residence, but against such non-residents as by corrupt bargains and leases made themselves tools to dishonourable patrons; and he only offends against this statute, who is non-resident, and yet at the same time leaseth out his benefice. *Johns.* 131.

Shall be ordinarily resident] If the parson be absent eighty days in a year, altho' it be at several times, to wit, ten days at one time, and twenty days at another time, until eighty days; this is non-residence of eighty days within the statute. *Gibf.* 739. (b)

Shall be ordinarily resident and serving the cure] If an incumbent, having a house fit for his habitation, liveth in a neighbouring parish, but cometh on all occasions to his parish church, to serve the cure in person; this, however it be non-residence within the statute of the 21 H. 8. c. 13. yet it is not such an absence as will avoid a lease within this statute. *Gibf.* 739. (c)

Without absence above fourscore days in any one year] If an incumbent is absent eighty days, and cometh again in the night of the eightieth day, he is no offender within this

(b) *Noy.* 116.

(c) 1 *Bulst.* 111.

statute;

statute; for the statute says, without absence *above* four-score days. *Gibf. 739. (d)*

Every such lease immediately upon such absence shall cease and be void] So that the lease is not void ab initio, but only from the time of such absence; which appears also from the preceding negative words, that the lease shall endure *no longer*; for that implies that it shall endure so long. And therefore, tho' the lease and covenants become void by the absence of eighty days, yet for any covenant broken before the end of the eighty days, an action of covenant will lie for the lessor or lessee. *Gibf. 739. (e)*

And the incumbent so offending] This shews, that it is not all absence whatsoever, that brings an incumbent under the penalties of this act; but such absence only as is voluntary, and by consequence an *offence* in the absentee: from which it follows, that if a parson be absent, and did not serve the cure, involuntarily, by reason of sickness suspension inhibition ejectment or other coercion or restraint; he is not absent within this statute. Much less can the absence of eighty days after death, avoid any lease according to this statute; the plain drift of which was, to oblige incumbents to residence while they lived, and not to punish them for non-residence after they were dead.

As to this last point, it had been debated in the reign of queen Elizabeth, and ruled by the opinions of three judges against one, that leases were void by this statute, eighty days after the death of the incumbent (*f*); the consequence of which would be, that parsons could make no manner of leases to bind their successors, longer than for eighty days after their death.

But in the 25 C. 2. (*g*) this matter coming under debate again; it was solemnly adjudged, contrary to the foregoing case, that such non-residence is not made by death, as can avoid a lease; and the consequence of that judgment is, 1. That parsons and vicars (observing the directions of the statute of the 32 H. 8. which is the great rule to all the other statutes) may make leases for twenty-one years or three lives, of lands accustomedly letten, and the like; which leases shall bind the successors, with confirmation, but not without; inasmuch as they are specially excepted

(d) *Cro. Eliz.* 88.

(e) *Cro. Eliz.* 78 & 245.

(f) *Mott v. Hales*, *Cro. Eliz.* 123. *Moor.* 270.

(g) *Bayly v. Munday*, 2 *Lev.* 61.

out of the enabling statute of the 32 *H.* 8. and the statute of the 13 *El.* c. 10. is wholly disabling. 2. That such leases of parsons and vicars as are not confirmed, tho' they do become void by their deaths, yet the voidance is according to the common law, and not according to this statute.

Concerning which leases of parsons and vicars (*viz.* those that are not confirmed by patron and ordinary, and by consequence hold not beyond the life or incumbency of the lessor) the rule is this: that if they be for a term of years absolutely, without saying *if the parson shall so long live*, and the parson dies, or resigns, or is deprived before the term expires; the lessee may recover damages in an action of covenant against the executors of the parson, for not enjoying his term. But if that clause be added, such action shall lie only upon resignation, or other voluntary avoiding of the lease: and against this action he is also safe, though he resign, or be non-resident, or the like, if he add, *and shall so long continue parson.* *Gibb.* 739, 740.

Littleton saith, if the parson of a church do charge the glebe land of his church by his deed; and after, the patron and ordinary confirm the same grant: then such grant shall stand in its force according to the purport thereof. But in this case it behoveth, that the patron hath a fee simple in the advowson; for if he hath but an estate for life or in tail in the advowson, then the grant shall not stand, but during his life, and the life of the parson which granted the same. *Litt. sel.* 528.

Upon which there are divers things to be noted:

(1) The confirmation of the grant: which indeed is but a mere assent by deed to the grant. And therefore it is holden, that if there be parson, patron, and ordinary, and the patron and ordinary give licence by deed to the parson, to grant a rent charge out of the glebe, and the parson granteth the rent charge accordingly, this is good, and shall bind the successor; and yet here is no confirmation subsequent, but a licence precedent.

(2) The ordinary alone, without the dean and chapter, may agree thereunto, either by licence precedent, or confirmation subsequent; for that the dean and chapter hath nothing to do with that which the bishop doth as ordinary in the life time of the bishop.

(3) But if the bishop be patron, there the bishop cannot confirm alone, but the dean and chapter must confirm also; for the advowson or patronage is parcel of the possession of the bishoprick; and therefore the bishop without the

the dean and chapter, cannot make the grant good, but only during his own life, after the decease of the incumbent, either by licence precedent or confirmation subsequent.

(4) He that is patron must be patron in fee simple; for if he be tenant in tail, or tenant for life, his confirmation or agreement is not good to bind any successor, but such as come into the church during his life. But if the patron be tenant in tail, and discontinue the estate in tail, the lease shall stand good during the discontinuance; or if the estate tail be barred, it shall stand good for ever. *1 Inst.* 300.

For a confirmation being in the nature of a charge upon the advowson, can operate no further in order to the binding of the successor, than according to the degree of estate or interest, which the patron hath who doth confirm. And therefore where a tenant in tail is patron; to render the confirmation valid, the issue in tail must also confirm: otherwise the presentee of such issue shall hold the benefice discharged of such lease. *Gibf.* 745. (b)

In like manner, if the patron who confirms hath granted the next avoidance; the clerk of such grantee shall not be bound, without the grantee's joining in the confirmation. *Gibf.* 745. (i)

And so, where there are coparceners or tenants in common of an advowson; they must all join in the confirmation to bind the next incumbent, unless they have agreed before to present by turns. *Gibf.* 745.

May demise one of them to his curate] That is, as it seemeth, to his curate legally licensed and admitted by the ordinary of the place; without which he is no curate in law. *Gibf.* 740.

Such lease shall endure no longer than during such curate's residence] So, that in this case, though the curate leases over, it should seem that no absence of the parson himself will void such lease, but the absence of the curate only. *Gibf.* 740.

(b) *1 Roll. Ab.* 480.

(i) *Cro. Car.* 582.

Lecturer.

Lecturer. 1. **I**N London and other cities there are lecturers appointed, as assistants to the rectors of churches. They are generally chosen by the vestry or chief inhabitants; and are usually the afternoon preachers. There are also one or more lecturers in most cathedral churches: and many lectureships have likewise been founded by the donation of private persons, as lady Moyer's at St. Paul's, and many others.

How appointed. 2. And it seemeth generally, that the bishop's power is only to judge as to the qualification and fitness of the person, and not as to the right of the lectureship: As in the case of the churchwardens of *St. Bartholomew's*, *Ad. 12 W.* One Fishburne left 25*l* a year for the maintenance of a weekly lecturer, and appointed that the lecturer should be chosen by the parishioners, and to preach on any day in every week as they should like best. The parishioners fixed on Thursday, and chose a lecturer every year: and now Mr. Turton being lecturer, and the parish having chosen Mr. Rainer, the other would not submit to the choice, whereupon the churchwardens shut Turton out of the church. Afterwards the bishop of London determined in his favour, and granted an inhibition and monition for that purpose. But by Holt chief justice; a prohibition must go to try the right: it is true a man cannot be a lecturer, without a licence from the bishop or archbishop; but their power is only as to the qualification and fitness of the person, and not as to the right of the lectureship; and the ecclesiastical court may punish the churchwardens, if they will not open the church to the person, or to any one acting under him, but not if they refuse to open it to any other. 3 *Salk.* 87.

But in case where there is no fixed lecturer, or ancient salary, but the lectureship is to be supported only by voluntary contributions, and there is not any custom concerning such election; it seemeth that the ordinary is the proper judge whether or no any lecturer in such place ought to be admitted: As in the case of a lecturer of *St. Anne's Westminster*, *T. 16 G. 2.* The court of king's bench, upon consideration, refused to grant a mandamus to the bishop of London to grant licence to a lecturer; who appeared to have no fixed salary, but to depend altogether upon voluntary contributions; and where there was no custom; and the rector had refused his leave to preach
in

in the church to the person now applying. *Str.* 1192.
1 Wilson, 11. (1)

3. By *Can.* 36. No person shall be received into the ministry, nor admitted to any ecclesiastical living, nor suffered to preach, to catechize, or to be lecturer or reader of divinity in either university, or in any cathedral or collegiate church, city, or market town, parish church, chapel, or any other place within this realm; except he be licensed either by the archbishop or by the bishop of the diocese where he is to be placed under their hands and seals, or by one of the two universities under their seal likewise; and except he shall first subscribe to the three articles concerning the king's supremacy, the book of common prayer, and the thirty-nine articles: and if any bishop shall license any person without such subscription, he shall be suspended from giving licences to preach for the space of twelve months.

Licence and his duty thereupon:

By *Can.* 37. None licensed as is aforesaid to preach, read lecture or catechize, coming to reside in any diocese, shall be permitted there to preach, read, lecture, catechize, or minister the sacraments, or to execute any other ecclesiastical function (by what authority soever he be thereunto admitted); unless he first consent and subscribe to the three articles before mentioned in the presence of the bishop of the diocese wherein he is to exercise such function.

By the statute of the 13 & 14 C. 2. c. 4. No person shall be allowed or received as a lecturer, unless he be first approved and thereunto licensed by the archbishop of the province, or bishop of the diocese, or (in case the see be void) by the guardian of the spiritualities, under his seal; and shall, in the presence of the said archbishop or bishop or guardian, read the nine and thirty articles mentioned in

(4) This doctrine has been recognized in the following cases. *Rex v. the Bishop of London*, 1 T. Rep. 331. relative to St. Luke, Chelsea, and *Rex v. Field, rector, and others the churchwardens of the united parishes of St. Anne, St. Agnes and Zachary*. 4 T. Rep. 125. For per Lord Mansfield, Ch. J. in the former case, No person can use the pulpit of another unless he consents. But if there has been an immemorial usage, the law supposes a good foundation for it; and if the lectureship be endowed, that affords a strong argument to support the custom. And per Lord Kenyon, Ch. J. in the latter case, The right of the lecturer, in such a case, partially supercedes the right of the rector.

the statute of 13 *El. c. 12.* with declaration of his unfeigned assent to the same : and every person who shall be appointed or received as a lecturer, to preach upon any day of the week, in any church chapel or place of public worship, the first time he preacheth (before his sermon) shall openly publickly and solemnly read the common prayers and service appointed to be read for that time of the day, and then and there publicly and openly declare his assent unto and approbation of the said book, and to the use of all the prayers rites and ceremonies forms and orders therein contained ; and shall upon the first lecture day of every month afterwards, so long as he continues lecturer or preacher there, at the place appointed for his said lecture or sermon, before his said lecture or sermon, openly publickly and solemnly read the common prayers and service for that time of the day, and after such reading thereof shall openly and publickly before the congregation there assembled declare his unfeigned assent unto the said book according to the form aforesaid ; and every such person who shall neglect or refuse to do the same, shall from thenceforth be disabled to preach the said or any other lecture or sermon, in the said or any other church chapel or place of public worship, until he shall openly publickly and solemnly read the common prayers and service appointed by the said book, and conform in all points to the things therein prescribed according to the purport and true intent of this act. *f. 19.*

Provided, that if the said lecture be to be read in any cathedral or collegiate church or chapel, it shall be sufficient for the said lecturer openly at the time aforesaid to declare his assent and consent to all things contained in the said book, according to the form aforesaid. *f. 20.*

And if any person who is by this act disabled [or prohibited, 15 *C. 2. c. 6. f. 7.*] to preach any lecture or sermon, shall during the time that he shall continue so disabled (or prohibited), preach any sermon or lecture, he shall suffer three months imprisonment in the common gaol ; and any two justices of the peace of any county within this realm, and the mayor or other chief magistrate of any city or town corporate within the same, upon certificate from the ordinary made to him or them of the offence committed, shall and are hereby required to commit the person so offending to the gaol of the same county city or town corporate. *f. 21.*

Provided, that at all times when any sermon or lecture is to be preached, the common prayers and service in and by

by the said book appointed to be read for that time of the day, shall be openly publickly and solemnly read by some priest or deacon, in the church chapel or place of publick worship where the said sermon or lecture is to be preached, before such sermon or lecture be preached, and that the lecturer then to preach shall be present at the reading thereof. *l. 22.*

And provided that this act shall not extend to the university churches, when any sermon or lecture is preached there, as and for the university sermon or lecture; but the same may be preached or read in such sort and manner, as the same hath been heretofore preached or read. *l. 23.*

Legacies. See *Wills.*

Legates.

OF legates there are three kinds:

1. *Legati a latere*; these are cardinals sent by the pope *a latere*, that is from his own immediate presence.

2. *Legati nati*, legates born; and of this kind was anciently the archbishop of Canterbury, who had a perpetual legatine power annexed to his archbishoprick.

3. *Legati dati*, legates given; and these are such as have authority from the pope by special commission. *Gal. 18, 19, 20, 21.*

Legend.

LEGEND, *legenda*, is that book which contained the lessons, whether out of the scriptures, or out of other books, which were to be read throughout the year. *Lind. 251.*

Letters dimissory. See *Ordination.*

Lewdness.

Prefutable in
the spiritual
court.

1. **BY Can.** 109. If any offend their brethren by adultery, whoredom, incest, ribaldry, or any other uncleanness, and wickedness of life, the churchwardens or questmen and siders, in their next presentment to their ordinaries, shall present the same, that they may be punished by the severity of the laws, according to their deserts; and such notorious offenders shall not be admitted to the holy communion, till they be reformed.

Anciently pun-
ishable in the
law.

2. In ancient times the king's courts, and especially the leets, had power to inquire of and punish fornication and adultery; and it appeareth often in the book of domesday, that the king had the fines assessed for those offences which were assessed in the king's courts, and could not be inflicted in the court christian. 2 *Inst.* 488.

And these fines were called *letcherwite*, *legerwite*, or *le-gergeldum*: *wite*, and *gelt* or *geld*, in the Saxon, do signify a tribute, fine, or amerciamment; and *leger* importeth a bed, from *liggan* to lie down, which in divers parts of England is still pronounced *ligg*. And these again, as also the Gothic *ligen*, the German *ligen*, the Danish *ligge*, the Belgic *liggen*, and the Latin *lectus*, (to shew the cognation of the languages of Europe and of the western Asia,) from the Greek word *λεχον*; and this again, from the Hebrew or Chaldee *lachath* or *lecheth*, which signifieth to lie down; as *lachen* or *lechen*, in the same languages, expresseth a harlot or concubine. Unto which fountain we may also refer our Anglo-Saxon word *lecher* (wherein the Saxons pronounced the *ch* hard, as the letter *χ*); as also the Latin *leccator*; and the Greek *λεχω*, which denoteth a woman in child-bed; and other such like.

No prohibition
to the spiritual
court.

3. But now by the 13 Ed. 1. st. 4. called the statute of *Circumspecte agatis*, it is enacted as follows: *The king to his judges sendeth greeting. Use your selves circumspectly in all matters concerning the bishop of Norwich and his clergy; not punishing them if they bold plea in court christian of such things as be meer spiritual, that is to wit, of penance enjoined by prelates for deadly sin; as fornication, adultery, and such like; for the which sometimes corporal penance and sometimes pecuniary is enjoined, specially if a freeman be convicted of such things. In all which cases, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.*

The

The bishop of Norwich] The bishop of *Norwich* is put here only for example; for the statute extendeth to all the bishops within this realm. 2 *Inst.* 487.

Fornication, adultery, and such like] Here are two examples in particular, of matters merely spiritual, which have no mixture of the temporalities, for the correction of these offences *pro salute animæ*. 2 *Inst.* 488.

And such like] These are to be taken for offences of like nature as the two offences here particularly expressed be; as solicitation of any woman's chastity, which is lesser than these, and for incest, which is greater. 2 *Inst.* 488.

In the case of *Gallifand and Rigaud, T. 1 An.* it was agreed by the court, that *solicitation of chastity* was of ecclesiastical cognizance; but yet that the prohibition should stand, because the person had been convicted on an indictment for an assault upon the woman with intent to ravish her, and after that, the woman had sued an action of assault and battery against him for the same offence, which action was depending at the same time that the prosecution was in the spiritual court; for the force added to it, which is temporal, makes it cognizable by the temporal courts. *L. Raym.* 809. *Gibf.* 1085.

In the case of *Harris and Hicks, H. 4 & 5 W.* A prohibition was moved for to the ecclesiastical court, where a suit was for *incest*, in marrying his first wife's sister, suggesting that the said second wife was dead, and by his said wife he had a son, to whom an estate was descended as heir to his mother, and that notwithstanding that he had pleaded this matter, they went on to annul the marriage and bastardize the issue. And by the court: a prohibition shall go as to annulling the marriage or bastardizing the issue, but they may proceed to punish the incest. 2 *Salk.* 548.

Pecuniary] That is, in commutation of penance. 2 *Inst.* 489.

By statute 27 *Geo. 3. cap. 44.* No suit shall be brought in any ecclesiastical court for fornication or incontinence after the expiration of eight kalendar months from the time when such offence shall have been committed; nor for fornication at any time after the parties shall have lawfully intermarried.

4. But altho' the sin of adultery is properly and of right belonging to the cognizance of the ecclesiastical jurisdiction: yet it will not be denied, but that as it is an offence against the peace of the realm (for which reason some are

also by the temporal laws.

of opinion that avoutry or bawdry is an offence temporal as well as spiritual) the justices of the peace may take cognizance thereof. *God. 474. (1)*

And Mr. *Hawkins* says, all open lewdness grossly scandalous, as it tendeth to subvert religion and morality, which are the foundation of government, are punishable by the temporal judges by fine and imprisonment, and also such corporal infamous punishment as to the court in discretion shall seem meet according to the heinousness of the crime. *1 Haw. 7.*

And especially, the keeper of a brothel house is punishable upon indictment at the common law, by fine and imprisonment; for altho' adultery and fornication be punishable by the ecclesiastical law, yet the keeping of a house of bawdry, or stews, or brothel house, being as it were a common nuisance, is punishable by the common law, and is the cause of many mischiefs, not only to the overthrow of mens bodies, and wasting of their livelihoods, but to the endangering of their souls. *3 Inst. 205.*

And a wife may be indicted together with her husband, and condemned to the pillory with him for keeping a bawdy house; for this is an offence as to the government of the house, in which the wife hath a principal share, and also such an offence as may generally be presumed to be managed by the intrigues of her sex. *1 Haw. 2.*

But it is said, that a woman cannot be indicted for being a bawd generally; for that the bare solicitation of chastity is not indictable. *1 Haw. 196. 1 Saik. 382.*

Temporal punishment in cases of bastardy in particular.

5. By the 18 *Eliz. c. 3.* Concerning bastards begotten and born out of lawful matrimony (an offence against God's law or man's law); it is enacted, that the justices of the peace shall take order as well for the punishment of the mother and reputed father, as for relief of the parish by charging such mother or reputed father, with the pay-

(1) There are some cases also in which the crime of *seduction* is punished by damages, to be recovered in a civil action. Thus a father may have an action against the seducer of his daughter, if she live with him at the time, and perform any acts of service. *Postlethwaite v. Parkes*, 3 *Bur.* 1878. 5 *Q. Rep.* 360. And a husband may have an action against an adulterer for criminal conversation with his wife; and though the gist of this action is the injury done to the husband, yet according to Lord Mansfield, in *Birt v. Barlow*, it has a mixture of penal prosecution. See *Marriage*, X. 5.

ment of money weekly, or other sustentation for the relief of such child, as to them shall seem meet (m).

And by the 7 *J. c. 4.* Every lewd woman which shall have any bastard which may be chargeable to the parish, the justices of the peace shall commit such lewd woman to the house of correction, there to be punished and set on work, during the term of one whole year; and if she afterwards offend again, then to be committed to the said house of correction as aforesaid, and there to remain until she can put in good sureties for her good behaviour, not to offend so again.

And by the 13 & 14 *C. 2. c. 12.* If the mother or reputed father run away and leave the child upon the charge of the parish, the justices of the peace may order their effects to be seized, in order to indemnify such parish.

6. Adultery is allowed by all, to be a sufficient cause of Adultery, divorce *a mensa et thoro.*

But if the defendant proves, that the plaintiff also hath committed adultery; he or she shall be discharged: for this is a compensation of the crime. *Clark 115.*

By the 13 *Ed. 1. ft. 1. c. 34.* *If a wife willingly leave her husband, and go away, and continue with her adulterer, she shall be barred for ever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon; except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action.*

7. By the 1 *H. 7. c. 4.* It shall be lawful to all archbishops, and bishops, and other ordinaries having episcopal jurisdiction, to punish and chastise priests, clerks, and religious men, being within the bounds of their jurisdiction, as shall be convicted before them by examination and other lawful proof requisite by the law of the church of adultery, fornication, incest, or any other fleshly incontinency, by committing them to ward and prison, there to abide for such time as shall be thought to their discretions convenient for the quality and quantity of their trespass. Clergymen further punishable.

And there have been some instances, since the reformation, of clergymen being deprived for adultery, of which our law books take notice, viz. one in the 12th, another in the 16th, and a third in the 27th year of queen Elizabeth. *Ayl. Parerg. 47. (n)*

(m) See *Bastards, IV.*

(n) See *Deprivation.*

Evidence,

8. Presumptions of guilt may go sometimes for a proof of the aforesaid crimes; as when a man and woman are seen in bed together, this is allowed to be sufficient evidence; for such crimes will scarce admit of other proof. *Wood. Civ. L. 274.*

Navy.

9. By the 22 G. 2. c. 33. All flag officers, and all persons in or belonging to his majesty's ships or vessels of war, being guilty of uncleanness, or other scandalous actions, in derogation of God's honour, and corruption of good manners; shall incur such punishment as a court martial shall think fit to impose, and as the nature and degree of their offence shall deserve. *Art. 2.*

Libel.

1. A Libel is a declaration or charge, drawn up in writing on the part of the plaintiff, unto which the defendant is obliged to answer. *Gibb. 1009.*

For when the defendant appeareth upon the citation, then the libel ought to be exhibited by the plaintiff, and a copy of it delivered to the defendant. *Wood. Civ. L. 318.*

2. To which purpose it is enacted by the statute of the 2 H. 5. c. 3. as follows: *Forasmuch as divers of the king's liege people be daily cited to appear in the spiritual court before spiritual judges, there to answer to divers persons, as well of things which touch freehold debt trespasses covenants and other things whereof the cognizance pertaineth to the court of our lord the king, as of matrimony and testament; and when such persons so cited appear and demand a libel of that which against them is surmised to be informed, to give their answer thereunto, or otherwise to purchase of our lord the king a writ of prohibition according to their case; which libel to them is denied by the said spiritual judges, to the intent that such persons should not be aided by any such writ against the law, and to the great damage of such persons so impleaded: our said lord the king, by the advice and assent of the lords spiritual and temporal, and at the request and instance of the commons, hath ordained and established, that at what time the libel is grantable by the law, it may be granted and delivered to the party without any difficulty.*

A libel of that which against them is surmised] In the second year of king James the first, all the justices of England

land were assembled, for their opinion (among other points) concerning the extent of this statute; whether it related only to proceedings between party and party, or also to proceedings *ex officio*; and their resolution hereupon is differently related. Croke's report of it is, that the statute is intended, where the ecclesiastical judge proceeds *ex officio* and *ore tenus*; whereas More and Noy say, it was unanimously resolved, that the statute intended only proceedings between party and party, and not proceedings *ex officio* and *ore tenus*. *Gibf.* 1009.

From this variety of reports concerning the resolution of the justices at that time, hath sprung a like variety in the subsequent judgments upon this head. In the 13 *Ja.* where the high commission proceeded not by way of libel but by articles, it was resolved, that the articles were in the nature of a libel, and so within the intent of the statute: in like manner in the 27 *Cha.* 2. where the case was, concerning articles of presentment, it was adjudged that a copy ought to be delivered, as well on articles of presentment as on other libels, and that the reading the presentment to the party is not sufficient. And before that, in the 20 *Cha.* 2. in the case of *Taylor* and *Brown*, the court resolved, that this statute extends, where the proceeding in the ecclesiastical court is *ex officio*, as well as between party and party; and that the report of More is ill reported, for Croke is contrary. *Gibf.* 1009.

On the other hand, not only More and Noy concur in their reports of the resolution as abovesaid; but so late as the 16 *Cha.* 2. in the case of *Scurr* and *Burrell* (that is but four years before the abovementioned case of *Taylor* and *Brown*), the court agreed, that where the libel is *ex officio* *judicia*, the judge is not bound to give a copy within this statute, but only where it is between party and party. *Gibf.* 1009.

But after all, it seemeth somewhat strange, that there should be so much difficulty about this matter. It is plain enough that More and Noy report the resolution right, and that in Croke it hath been nothing but a slip of the pen, or error in the impression. It is sufficiently evident, from the words of the statute itself, that proceedings betwixt party and party are by no means intended to be excluded; for it reciteth that persons are daily cited to appear in the spiritual court to answer to divers persons of things which touch freehold, debt, trespass, and the like, all of which concern matters between party and party; the only doubt was, whether it should extend also to proceedings *ex officio*;

and the case there was, that the high commissioners had deprived certain puritan ministers, proceeding against them *ex officio* being *ore tenus* convocati. And Croke says (*Cro. Jac.* 37.), that all the justices held, that they were lawfully so deprived: and then the justices being asked, whether a prohibition be grantable against the commissioners upon this statute, if they do not deliver a copy of the libel to the party; Croke says, that they all answered that the *statute is intended where the ecclesiastical judge proceeds ex officio et ore tenus*: but to make it consistent with what went before, he must have meant to say, that the *statute is "not" intended where the ecclesiastical judge proceeds ex officio et ore tenus*. And the nature of the case requires it; for they all held, that the ministers were lawfully deprived, and it is certain in that case they had no copy of the libel given them, for there was no libel.

Nevertheless, the law hath since been held to be otherwise: for, *M. 2 An. Anonym.* It was held, that a prohibition lieth for denying a copy of the libel, to any ecclesiastical court; for the ecclesiastical jurisdiction is limited; and the party ought to know whether the matter be within their jurisdiction, and how to answer. And Holt chief justice said, that it was formerly held by all the judges of England, that when there was a proceeding *ex officio* in the ecclesiastical court, they were not bound to give the party a copy of the articles; but the law is otherwise; for in such case, if they refuse to give a copy of the articles, a prohibition shall go until it be given. And accordingly in this case a prohibition was granted by the court. *2 Salk.* 553. (o)

But after a copy is given, the prohibition *ipso facto* is discharged, without any writ of consultation issued. *Gibf.* 1010. (p)

At what time the libel is grantable by the law] Therefore this statute was not introductory of a new law, but only an affirmation of the common law. *Gibf.* 1009.

It may be granted and delivered to the party] In the case of *Syms and Selwood*, *M. 27 C. 2.* When the ecclesiastical court declared, that proclamation, or reading with an audible voice in court was a delivery; a prohibition was granted by the temporal court unless cause shewed. *3 Keb.* 565.

(o) In this case a prohibition shall go *quousque*, they deliver a copy. *Raym.* 991.

(p) *6 Mod.* 308.

Without

Without any difficulty] And if a copy of the libel is not delivered, there is a writ in the regiller to compel the delivery of it. *Gibf.* 1010. (q)

Fitzherbert saith, If a man be sued in the spiritual court, and the judges there will not grant unto the defendant a copy of the libel, then he shall have a prohibition directed unto them for to surcease, until they have delivered the copy of the libel (r). Which prohibition the more modern books have put under these two limitations; first, that before it is granted, an oath be required, of the denial of the libel (s); and secondly, that it shall not be granted at all, if the appeal is made for such denial, (as for a gravamen,) from an inferior to a superior court, because the party hath his election, and hath chosen another remedy. *Gibf.* 1010. (t)

To the remedy by way of prohibition, Fitzherbert adds that the defendant may have an action against them upon this statute, if they will not deliver the copy of the libel, whether the cause in the libel be a spiritual cause or not. *Gibf.* 1010. (u)

3. By the several stamp acts, every libel or copy thereof, shall be upon a treble sixpenny stamp (w).

Library.

1. BY the 7 *An. c.* 14. Whereas in many places in England, the provision for the clergy is so mean, that the necessary expence of books for the better prosecution of their studies cannot be defrayed by them; and whereas several persons of late years have by charitable contributions erected libraries within several parishes and districts; but some provision is wanting to preserve the same, and such others as shall be provided in the same manner, from embeizilment: it is enacted, that in every parish or place where such a library is or shall be erected, the same shall be preserved for such uses as the same is and shall be given; and the orders and rules of the founders thereof shall be observed and kept. *f. 1.*

*Establishment of
parochial libra-
ries confirmed.*

2. And it shall be lawful for the proper ordinary, or his commissary or official, or the archdeacon, or by his direc-

*Ordinary to visit
the same.*

(q) *Reg.* 58.

(r) *F. N. B.* 43.

(s) 1 *Vent.* 252.

(t) 3 *Keb.* 565.

(u) *F. N. B.* 43. E.

(w) Since increased to 2 s 6 d.

tion

tion his official or surrogate, if the said archdeacon be not the incumbent of the place where such library is, in their visitation to inquire into the state and condition of the said libraries, and to amend and redress the grievances and defects of and concerning the same, as to him or them shall seem meet: and it shall be lawful for the proper ordinary from time to time, as often as shall be thought fit, to appoint such persons as he shall think fit, to view the state and condition of such libraries; and the said ordinaries, archdeacons, or officials respectively, shall have free access to the same, at such times as they shall respectively appoint. s. 3.

To be locked up during the vacancy of the church.

3. And to prevent any embezzlement of books upon the death or removal of any incumbent; immediately after such death or removal, the library belonging to such parish or place shall be forthwith shut up, and locked, or otherwise secured by the churchwardens, or by such persons as shall be authorized by the proper ordinary or archdeacon respectively; so that the same shall not be opened again, till a new incumbent, rector, vicar, minister, or curate shall be inducted or admitted. s. 6.

Provided, that if the place where such library shall be kept, shall be used for any publick occasion for meeting of the vestry or otherwise for the dispatch of any business of the said parish, or for any other publick occasion for which the said place hath been ordinarily used; the said place shall nevertheless be made use of as formerly for such purposes, and after such business dispatched, shall be again forthwith shut and locked up, or otherwise secured as is before directed. s. 7.

New incumbent to give security.

4. And for the encouragement of such founders and benefactors, and to the intent they may be satisfied that their pious and charitable intent may not be frustrated; every incumbent, rector, vicar, minister, or curate of a parish, before he shall be permitted to use or enjoy such library, shall enter into such security by bond or otherwise for preservation of such library, and due observance of the rules and orders belonging to the same, as the proper ordinaries within their respective jurisdictions in their discretion shall think fit. s. 2.

And to make new catalogues.

5. And where any library is appropriated to the use of the minister of any parish or place, every rector, vicar, minister or curate of the same, within six months after his institution induction or admission, shall make a new catalogue of all books remaining in or belonging to such library, and shall sign the said catalogue, thereby acknowledging

ledging the custody and possession of the said books; which said catalogue so signed shall be delivered to the proper ordinary within the time aforesaid, to be kept or registred in his court, without any fee or reward for the same. f. 4.

And where any library shall at any time hereafter be given and appropriated to the use of any parish or place, where there shall be an incumbent rector vicar minister or curate in possession; he shall make a catalogue thereof, and deliver the same as aforesaid, within six months after he shall receive such library. f. 5.

6. And none of the said books shall in any case be alienable, or be alienated, without the consent of the proper ordinary; and then only, when there is a duplicate of such book. f. 10. Books not to be alienated.

7. And in case any book or books be taken or otherwise lost out of the said library, it shall be lawful for a justice of the peace to grant his warrant to search for the same; and in case the same be found, such book or books so found shall immediately by order of such justice be restored to the said library. f. 10. Remedy in case of books lost or detained.

And in case any book or books belonging to the said library shall be taken away and detained, it shall be lawful for the incumbent, rector, vicar, minister, or curate for the time being, or any other person or persons, to bring an action of trover and conversion, in the name of the proper ordinaries within their respective jurisdictions; whereupon treble damages shall be given, with full costs of suit, as if the same were his or their proper book or books; which damages shall be applied to the use and benefit of the said library. f. 2.

8. And for the better preservation of such books, and that the benefactions given towards the same may appear; a book shall be kept within the said library, for the entering and registring of all such benefactions and such books as shall be given towards the same, and therein the minister shall enter such benefaction, and an account of all such books as shall from time to time be given, and by whom given. f. 8. Account to be kept of new benefactions.

9. And for better governing the said libraries, and preserving of the same, it shall be lawful for the proper ordinary, together with the donor of such benefaction (if living) and after the death of such donor for the proper ordinary alone, to make such other rules and orders concerning the same, over and above, and besides, but not contrary to such as the donor of such benefaction shall in his discretion judge New regulations from time to time how to be made.

judge fit and necessary; which said orders and rules so to be made, shall from time to time be entred in the said book or some other book to be prepared for the purpose, and kept in the said library. s. 9.

Exception.

10. But nothing in this act shall extend to a publick library erected in the parish of Ryegate in the county of Surrey, for the use of the freeholders vicar and inhabitants of the said parish, and of the gentlemen and clergymen inhabiting in parts thereto adjacent; the said library being constituted in another manner than the libraries provided for by this act. s. 11.

Litany. See Public Worship.

London: Custom of distribution of intestates effects there. See Wills.

Lord's day.

THE penalties of 12d a Sunday, and 20l a month, for not resorting to church on the Lord's day, are treated of under the titles Public Worship and Popery.

Due observance
of the Lord's
day.

1. Can. 13. All manner of persons within the church of England shall celebrate and keep the Lord's day commonly called Sunday, according to God's holy will and pleasure and the orders of the church of England prescribed in that behalf; that is, in hearing the word of God read and taught, in private and publick prayers, in acknowledging their offences to God and amendment of the same, in reconciling themselves charitably to their neighbours where displeasure hath been, in oftentimes receiving the communion of the body and blood of Christ, in visiting the poor and sick, using all godly and sober conversation.

Exercising
worldly calling
on the Lord's
day.

2. (a.) By the 1 J. c. 22. *No shoemaker shall shew, to the intent to put to sale, any shoes, boots, buskins, startops, slippers or pant-fles, upon the Sunday, on pain of forfeiting 3s 4d a pair, and the value thereof; to be recovered at the assizes, sessions, or last; one third to the king, one third to him who shall sue, and one third to the town or lord of the last where the offence shall be committed.* s. 28, 46, 50.

By the 3 C. c. 1. *Forasmuch as the Lord's day commonly called Sunday, is much broken and profaned, by carriers wag-*

poners carters wainmen butchers and drovers of cattle, to the great dishonour of God and reproach of religion; it is enacted, that no carrier with any horse or horses, nor waggonmen with any waggon or waggons, nor carmen with any cart or carts, nor wainman with any wain or wains, nor drovers with any cattle, shall by themselves or any other travel upon the said day, on pain of 20 s: or if any butcher, by himself, or any other for him by his privity or consent, shall kill or sell any victual on the said day, he shall forfeit 6 s 8 d. The same being done in the view of any justice of the peace, mayor or other head officer of any city or town corporate, or proof on oath of two witnesses, or confession: to be levied by a constable or churchwarden, by warrant of such justice or head officer, by distress and sale; or the same may be recovered, by any person who shall sue for the same, by bill plaint or information, in any of his majesty's courts of record, in any city or town corporate, before his majesty's justices of the peace in their general quarter sessions of the peace: the same to be employed to the use of the poor of the parish where the offence shall be committed; saving only that it shall be lawful for such justice mayor or head officer, out of the said forfeitures to reward such person as shall inform or otherwise prosecute as aforesaid, so as such reward exceed not the third part of the forfeitures. Prosecution to be in six months. And provided, that this act shall not in any sort abridge or take away the authority of the court ecclesiastical.

If any butcher E. 12 G. K. and Brotherton. There was an indictment for exercising the trade of a butcher on a Sunday: and exception was taken, that it was not laid to be against the form of the statute, and it was no offence at common law. And upon demurrer, judgment was given for the defendant. Str. 702.

By the 29 C. 2. c. 7. All persons shall on every Lord's day apply themselves to the observation of the same, by exercising themselves therein in the duties of piety and religion, publicly and privately: and no tradesman artificer workman labourer or other person whatsoever, shall do or exercise any worldly labour business or work of their ordinary callings on the Lord's day or on any part thereof (works of necessity and charity only excepted): and every person being of the age of fourteen years and upwards, offending in the premises, shall forfeit 5 s. And no person shall publicly cry, shew forth, or expose to sale, any wares merchandizes fruit books goods or chattels whatsoever, upon the Lord's day, or any part thereof; on pain of forfeiting the same. And no drover horse-courser waggoner butcher bigler or any of their servants, shall travel or come in to his or their inn or lodging, upon the Lord's day, or any part thereof; on pain of 20 s. And

Lord's day.

no person shall use employ or travel upon the Lord's day, with any boat, wherry lightier or barge (except it be upon extraordinary occasion, to be allowed by a justice of the peace of the county, or head officer or some justice of peace of the city borough or town corporate where the fact shall be committed); on pain of 5s. And if any person offending in any of the premises, shall be thereof convicted before any justice of the peace of the county, or chief officer or justice of the peace of the city borough or town corporate where the offence shall be committed, on view or confession or oath of one witness; the said justice or chief officer shall give warrant to the constables or churchwardens of the parish where the offence shall be committed, to seize the said goods cried, shewed forth, or put to sale as aforesaid, and to sell the same; and to levy the said other forfeitures or penalties by distress and sale; and in default of such distress, or in case of insufficiency or inability of the said offender to pay the said forfeitures or penalties, that then the party offending be set publicly in the stocks, by the space of two hours. And all the forfeitures or penalties aforesaid shall be employed and converted to the use of the poor of the parish where the offence shall be committed; save only that such justice mayor or other head officer may reward the informer out of the same, not exceeding the third part. But this shall not extend to the prohibiting of dressing of meat in families, or dressing or selling of meat in inns, cook shops, or victualling houses, for such as otherwise cannot be provided; nor to the crying or selling of milk, before nine of the clock in the morning, or after four of the clock in the afternoon. Prosecution for the said offences to be in ten days. (x)

But

(x) On this act the following cases have occurred. *Rex v. Cox*, was a motion for an information against a justice of the peace for refusing to proceed upon an information against a baker, who baked puddings and pies, and other such things for dinner. The court were of opinion that this was not an offence within the act, it being a work of necessity and charity, and within the equity of the proviso relating to a cook's shop; for it is better that one baker and his men should stay at home, than many families and servants. 2 Burr. 785. Afterwards a baker was convicted, by four separate convictions, for selling hot loaves on the same Sunday. But the court said that there could be but one entire offence on the same day, and therefore only one penalty of 5s. *Cress v. Durdan*, *Corop.* 640. And in *M. 34 G. 3.* a baker being convicted on the statute, for baking meat and pastry for his customers on a Sunday, per *Ld. Kenyon, Ch. J.* The laborious part of the community

Lord's day.

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But by the 10 and 11 W. c. 24. *Mackerel* are allowed to be sold on sundays, before or after divine service. f. 14.

And by the 2 G. 3. c. 15. *Fish carriages* (for the supply chiefly of the markets within London and Westminster) shall be allowed to pass on sundays or holidays, whether laden or returning empty.

And by the 11 & 12 W. c. 21. The rulers and overseers, auditors and assistants of the society and company of *watermen* of the river Thames, may appoint any number of watermen not exceeding forty, to ply and work on every Lord's day between Vaux Hall and the Lime house, for the carrying passengers at one penny each person; the same to be applied (after paying thereout to such persons for their day's labour so much as shall be agreed on) to the use of the poor aged decayed and maimed watermen and lightermen of the said society and their widows. f. 13.

And by the 9 An. c. 23. It shall be lawful for any licensed *hackney coachman* or his driver, or any chairman, to ply and stand with their coaches and chairs, and to drive and carry the same respectively on the Lord's day, within the limits of the bills of mortality. f. 20.

In the register of archbishop Chicheley, we find a special declaration, forbidding the *barbers* of London to exercise their callings on the Lord's day; and in a visitation of archbishop Warham, we find *barbers* and *butchers* presented in the spiritual court for exercising their several trades on that day, and admonished to forbear it, on pain of ecclesiastical censures. *Gibbs*. 238.

2. (b.) By 34 G. 3. c. 61. *Whereas many persons exercising the trade of bakers do under pretence of being employed in works of necessity or charity carry on their trade or calling on the Lord's day, and are employed therein during a much greater part thereof than is requisite for such purposes; It is enacted that no baker carrying on his business in the city of London or within 12 miles thereof, shall on any pretence whatsoever, make bake or expose to sale any bread or rolls*

city must be fed on that day; and many of them have not the means of dressing their dinners at home. The Sabbath will be better observed, if the construction put upon this law in *R. v. Cox* be adopted, than by over-ruling that determination, and the conviction was quashed. *Rex v. Younger*, 59. Rep. 449. Since which case this subject has been regulated by the 34 G. 3. c. 61. See *infra*, 2. (b).

or

or bake any meat puddings pies or tarts or in any other manner exercise his trade or calling except in the manner allowed by that act, which allows the selling of bread, and the baking of meat puddings or pies only, on the Lord's day between the hours of nine of the clock in the forenoon and one of the clock in the afternoon, so as the person requiring the baking thereof shall carry or send the same to and from the place where such meat pudding or pie is baked. The penalty is 10s. and prosecutions are to be commenced within six days after the offence committed.

Fairs and markets on the Lord's day.

3. By the 27 H. 6. c. 5. *Considering the abominable injuries and offences done to almighty God, and to his saints, always aiders and singular assisters in our necessities, because of fairs and markets upon their high and principal feasts, as in the feast of the ascension of our Lord, in the day of corpus Christi, in the day of whitsunday, in Trinity sunday, with other sundays, and also in the high feast of the assumption of our blessed lady, the day of all saints, and on good friday, accustomedly and miserably holden and used in the realm of England; in which principal and festival days, for great earthly covetise, the people is more willingly vexed, and in bodily labour soiled, than in other ferial days, as in fastening and making their booths and stalls, bearing and carrying, lifting and placing their wares outward and homeward, as tho' they did nothing remember the horrible defiling of their souls in buying and selling, with many deceitful lies, and false perjury, with drunkenness and strifes, and so specially withdrawing themselves and their servants from divine service; it is ordained, that all manner of fairs and markets in the said principal feasts and sundays and good friday, shall clearly cease from all shewing of any goods or merchandizes, (necessary victual only except,) upon pain of forfeiture of all the goods aforesaid so shewed, to the lord of the franchise or liberty where such goods contrary to this ordinance shall be shewed (the four sundays in harvest except). Nevertheless the king of his special grace by authority of the parliament granteth to them power, which of old time had no day to hold their fair or market, but only upon the festival days aforesaid, to hold by the same authority and strength of his old grant, within three days next before the said feasts, or next after, proclamation first made to the simple common people upon which day the aforesaid fair shall be holden, always to be certified without any fine or fee to be taken to the king's use. And they which of old time have, by special grant, sufficient days before the feasts aforesaid, or after, shall in like manner as is aforesaid hold their fairs and markets the full number of their days; the said festivals and sundays, and good fridays except.*

Provided,

Provided, that this present ordinance shall endure until the next parliament, and so forth; except in the said parliament a reasonable cause be alledged shewed and proved, for the which it shall seem not expedient that the aforesaid ordinance shall so endure.

Within three days next before the said feast, or next after] In the 8 & 9 of queen Elizabeth, a bill was read the first and second time, to avoid fairs and markets on Sunday, to the next working day following; which therefore seems to be the bill that had been prepared in the convocation of 1562, whereby it was provided, that upon every sabbath day and principal feast day, be kept neither open fair nor market throughout the year; and that all persons or corporations, having by patent such days expressed, may change the same days with the days immediately following or going before the said Sundays or principal feast day. *Gibf. 242.*

In the third year of king Charles the first, a national fast having been appointed, the bishop of Winchester was directed to move the king, that whereas on that day divers fairs and markets were granted to divers towns by charter, his majesty would be pleased, that in those places they might have liberty to keep the said fast the next day after the said fairs ended, notwithstanding his majesty's proclamation to that day; with which his majesty was well pleased, and the bishops of each diocese were directed by the house to take care accordingly. *Gibf. 275.*

M. 38 & 39 El. Comyns and Boyer. A fair holden upon the Sunday is sufficient in law; for altho' by the statute there is a penalty inflicted upon the party that sells upon that day, yet it maketh not the sale to be void. *Cro. Eliz. 485.*

4. By the 1 C. c. 1. *Forasmuch as there is nothing more acceptable to God, than the true and sincere service and worship of him according to his holy will, and that the keeping holy of the Lord's day is a principal part of the true service of God, which in very many places of this realm hath been and now is profaned and neglected by a disorderly sort of people, in exercising and frequenting bear-baiting, bull-baiting, interludes, common plays, and other unlawful exercises and pastimes upon the Lord's day; and for that many quarrels, bloodsheds and other great inconveniences, have grown by the resort and concourse of people going out of their own parishes, to such disordered and unlawful exercises and pastimes, neglecting divine service both in their own parishes and elsewhere: it is enacted, that from henceforth there shall be no meetings, assemblies, or concourse of*

people, out of their own parishes, on the Lord's day, for any sports and pastimes whatsoever; nor any bear-baiting, bull-baiting, interludes, common plays, or other unlawful exercises and pastimes, used by any persons within their own parishes. And every person offending in any the premisses, shall forfeit for every offence 3 s 4 d to the use of the poor. And any justice of the peace of the county, or chief officer of a city borough or town corporate where the offence shall be committed, who on his own view, or confession of the party, or proof of one witness by oath, shall find any person offending in the premisses, shall give warrant under his hand and seal to the constables and churchwardens of the parish where the offence shall be committed, to levy the said penalty so assessed by distress and sale; and in default of such distress, that the party offending be set publicly in the stocks by the space of three hours. Provided, that no man be impeached by this act except he be called in question within one month next after the offence committed. Provided also that the ecclesiastical jurisdiction by virtue of this act, shall not be abridged; but that the ecclesiastical court may punish the said offences, as if this act had not been made.

The keeping holy of the Lord's day] Which duty Lindwood thus describes: 'To keep it-holy and pure with reverence, that is to say, generally, by ceasing on that day from wickedness; particularly by resting from bodily labour, which hinders the operations of the soul towards God; and most especially, by employing it wholly in divine contemplations. And elsewhere, he says, we must rest wholly unto God. From which, and from the many laws that were made in the times of our Saxon ancestors against profaning the Lord's day, the learned bishop Stillingfleet draws this pious conclusion, That the religious observance of the Lord's day is no novelty started by some sects and parties among us; but that it hath been the general sense of the best part of the christian world, and is particularly enforced upon us of the church of England, not only by the homilies, but by the most antient ecclesiastical laws amongst us. Accordingly (before the book of sports had been set forth by king James the first) not only the injunctions of Edward the sixth and queen Elizabeth had specially enforced this duty; but a bill had been provided by the bishops in the twelfth year of queen Elizabeth for enforcing the observance of it; and divers bills for that end had also been actually brought into parliament: one, in the 27 Elizabeth, intituled, A bill for the better and more reverend observing of the sabbath day; which having passed both houses after great disputation, was denied the royal assent, probably upon

upon the dislike the queen had of the parliament's intermeddling in matters of religion. Three attempts of the like nature were also made in the reign of king James the first; as appears by the journals of parliament in the several years: and (after what had been done in the first and in the third year of king Charles the first) we find a bill in parliament in the sixteenth of Charles the second, for punishing divers abuses committed on the Lord's day; and in the same year, when a bill for the better observation of the Lord's day was prepared for the royal assent, and ready to be passed, it was stolen, and could not be recovered upon a strict examination made by the house of lords. *Gibf. 236.*

There shall be no meetings, assemblies, or concourse of people, out of their own parishes, on the Lord's day, for any sports and pastimes whatsoever] This also was provided against in king James's book of sports: "We do likewise straightly command that every person shall resort to his own parish church, to hear divine service, and each parish by itself to use the said recreation after divine service." *Gibf. 236.*

For any sports and pastimes whatsoever] King James the first, in the aforesaid book of sports, in the year 1618, publicly declared to his subjects these games following to be *lawful*; viz. dancing, archery, leaping, vaulting, may-games, whitfun ales, and morris dances; and did command that no such honest mirth or recreation should be forbidden to his subjects on sundays after evening service: but restraining all recusants from this liberty; and commanding each parish (as was said before) to use these recreations by it self; and prohibiting all *unlawful* games, bear-baiting, bull-baiting, interludes, and bowling by the meaner sort. *Dak. c. 46. Gibf. 236.*

[5. (1.) By the 13 G. 3. c. 80. s. 6. If any person or persons shall upon a sunday or on christmas day, in the day time, knowingly and wilfully take kill or destroy any hare pheasant partridge heath game or moor game, or shall upon a sunday or on christmas day use any gun dog net or engine for taking killing or destroying any of the same, every such person being convicted thereof upon the oath or oaths of one or more credible witness or witnesses, before one or more justice or justices of the peace, in the manner and form prescribed by the said act, shall forfeit for the first offence a sum not exceeding 20 l nor less than 10 l; for the second offence not more than 30 l nor less than 20 l; and for the third offence may be committed to the common

Killing game or using a gun on a sunday or christmas.

Lord's day.

gaol of the county, till he enter into a recognizance to appear at the next quarter sessions, where if he be convicted, he shall forfeit the sum of 50 l; which if he neglect or refuse to pay, he may be imprisoned for a term not less than six nor more than twelve months, and at the expiration thereof be publicly whipt.]

Houses of entertainment.

5. (2.) By the 21 G. 3. c. 49. Whereas certain houses, rooms, or places, within London and Westminster or in the neighbourhood thereof, have been frequently opened for publick entertainment or amusement, upon the evening of the Lord's day; and at other places within the said limits, under pretence of inquiring into religious doctrines, debates have frequently been held on the evening of the Lord's day, concerning divers texts of holy scripture, by persons unlearned and incompetent to explain the same, to the corruption of good morals, and to the great encouragement of irreligion and profaneness; it is enacted, that every house, room, or other place, which shall be opened or used for publick entertainment or amusement, or for publickly debating on any subject whatsoever, upon any part of the Lord's day called sunday, and to which persons shall be admitted by the payment of money or by tickets sold for money, directly or indirectly, shall be deemed a disorderly house or place: and the keeper thereof shall forfeit 200 l. for every sunday the same shall be so used as aforesaid, and be otherwise punishable as the law directs in cases of disorderly houses; and the person managing the same, or acting as master of the ceremonies, or as moderator, president, or chairman in any such debate, shall forfeit 100 l; and the door-keeper or other person delivering out tickets. 50 l; and any person advertising such amusement shall also forfeit 50 l. The said penalties to be recovered, with full costs, in any of his majesty's courts of record at Westminster, by any person who shall sue for the same, within six kalendar months after the offence committed. Provided, that nothing herein shall be construed to abridge the ecclesiastical jurisdiction, or any of the liberties or immunities of the act of toleration.

Process,

6. By the 29 C. 2. c. 7. *No person, upon the Lord's day, shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree (except in cases of treason, felony, or breach of the peace); but the service of the same shall be void to all intents and purposes: and the person so serving or executing the same, shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he had done the same with-*

out any writ, process, warrant, order, judgment, or decree at all. s. 6.

Shall serve or execute, or cause to be served or executed, any writ, process, &c.] Before this statute, one might have been attached for arresting another on sunday (as in *Prinſer's* case, *H. 16 Car.* who was fined 20s for so doing); but with this circumstance, that he might have arrested him upon any other day of the week. Agreeably to which, *Keeling* said, upon such a motion, that he had known many attachments for arresting a man upon a sunday, but still the affidavit contained, that he might have been taken on another day; to which *Twissden* added, that so also it was for arresting a man as he was going to church, to disgrace him. *Cra. Car.* 602. 1 *Mod.* 56.

Process] A libel was exhibited in the spiritual court of Durham against a woman for incontinence, and the citation was fixed upon the church door on a sunday, according to custom; upon which it was urged as the opinion of civilians, that such citation was sufficient without a personal serving, and that this had been the constant practice both before and since this statute: and *Holt* chief justice said, if the ecclesiastical law was and had always been to serve this process on a sunday (in which respect it was different from temporal process, which may be as well served on any other day), that then it did not seem to be the intent of this statute, to take away the serving it in that manner; which is only meant of processes that may as well be executed at any other time. 5 *Mod.* 449. 2 *Salk.* 625. (y)

(y) If sunday be the last of the four days allowed to plead in abatement, the defendant may file such plea on the fifth day. 3 *T. Rep.* 642. So if a plea be demanded on a saturday, the defendant has twenty-four hours to plead, exclusive of the whole of sunday. 4 *T. Rep.* 557. And if exception be taken to bail, in which case four days are allowed to perfect bail (the first exclusive and the last inclusive); if the exception be taken on a wednesday, sunday being no day, an attachment cannot regularly issue against the sheriff till the tuesday following. 2 *H. Bl.* 35. If a man be arrested on a sunday, he may be discharged out of custody by applying to the courts of law; but being once in lawful custody, if he escape without the privity of the sheriff, he may be *retaken* at any time. 5 *T. Rep.* 25. (See also *Church*, X. 1.) Writs which are returnable on a sunday, must be executed at latest the saturday before. 2 *H. Bl.* 29.

Lord's day.

Except in cases of treason, felony, or breach of the peace But by the 5 *An. c. 9.* a judge's warrant for apprehending a person escaped out of the king's bench or fleet prison, may be executed on the Lord's day. *l. 3.*

Breach of the peace] A justice of the peace made a warrant to a constable, to take another person to find sureties for the good behaviour. The constable executed the warrant on a Sunday: and he was justified by the court; who resolved, that a warrant for the good behaviour is a warrant for the peace and more, and that this statute is to be favourably interpreted for the peace. *Raym. 250.*

Robbery.

7. By the same statute, *If any person which shall travel upon the Lord's day, shall be then robbed; no hundred, or the inhabitants thereof, shall be charged with or answerable for any robbery so committed; but the person so robbed shall be barred from bringing any action for the said robbery. Nevertheless, the inhabitants of the counties and hundreds (after notice of any such robbery to them or some of them given, or after hue and cry for the same to be brought) shall make fresh suit after the offenders; on pain of forfeiting to the king as much money as might have been recovered against the hundred by the party robbed, if this law had not been made. l. 5.*

If any person &c.] This clause was probably inserted, with reference to a judgment given in the court of king's bench, *M. 16 J.* in the case between *Waite* and the hundred of *Stoke*; where the question was, whether one being robbed upon the Sunday morning in time of divine service, and making hue and cry, and the hundred not producing any of the robbers, the said hundred should be chargeable by the statute? And this question was twice argued at the bar on both sides; and the justices delivering their opinions seriatim, because it was a leading case in this point, and had never before been questioned, *Croke*, *Doderidge*; and *Haughton* held that the hundred was chargeable; but *Mountague* chief justice held the contrary, for this among other reasons, because the law appoints that men should be at divine service on Sunday, and as it is at the peril of those who will travel upon Sundays, if they be robbed. However, judgment was given otherwise; and it appears not by the report, what the particular occasion was, to travel on the Sunday. *Cro. Ja. 496. Gibb. 239.*

Which shall travel upon the Lord's day] *M. 7 G. Telsmaier* against the hundred of *Edmington*. The plaintiff lived a mile from the church, and going thither with his lady in his coach upon a Sunday, was robbed; and brought his action against the hundred, and recovered; for the statute extends

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extends only to the case of *travelling*: but *Pratt* chief justice said, if they had been going to make visits, it might have been otherwise. *Sir.* 406. (z)

Lord's supper.

CONCERNING the administering of this sacrament to sick persons: see title *Sick*.

[And concerning the taking of the sacrament before election into any office of magistracy, or place relating to the government of any corporation: see title *Dissenters*, l. 4.]

Rubrick. There shall none be admitted to the holy communion, until such time as he be confirmed, or be ready, and desirous to be confirmed.

Peccham. None shall give the communion to the parishioner of another priest, without his manifest licence: which ordinance nevertheles shall not extend to travellers, nor to persons in danger, nor to cases of necessity. *Lind.* 233.

Travellers] For travellers are parishioners of every parish. *Id.*

Persons in danger] That is, in danger of death. *Id.*

And by *Can.* 28. The churchwardens or questmen and their assistants shall mark, as well as the minister, whether any strangers come often and commonly from other parishes to their church, and shall shew their minister of them, lest perhaps they be admitted to the Lord's table amongst others; which they shall forbid, and remit such home to their own parish churches and ministers, there to receive the communion with the rest of their own neighbours.

Rubr. And if any be an open and notorious evil liver, or have done any wrong to his neighbours by word or deed, so that the congregation be thereby offended; the curate, having knowledge thereof, shall call him and advertise him, that in any wise he presume not to come to the Lord's table, until he hath openly declared himself to have truly repented, and amended his former naughty life; that the congregation may thereby be satisfied, which before were

(z) In which opinion the court of common pleas afterwards concurred. *Cam.* 345.

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offended;

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offended; and that he hath recompensed the parties to whom he hath done wrong; or at least declare himself to be in full purpose so to do, as soon as he conveniently may.

Rubr. The same order shall the curate use with those betwixt whom he perceiveth malice and hatred to reign; not suffering them to be partakers of the Lord's table, until he know them to be reconciled. And if one of the parties so at variance be content to forgive, from the bottom of his heart, all that the other hath trespassed against him, and to make amends for that he himself hath offended, and the other party will not be persuaded to a godly unity, but remain still in his frowardness and malice; the minister in that case ought to admit the penitent person to the holy communion, and not him that is obstinate. Provided, that every minister so repelling any, as is specified in this or the next preceding paragraph of this rubrick, shall be obliged to give an account of the same to the ordinary, within fourteen days after at the farthest. And the ordinary shall proceed against the offending person according to the canon.

By *Can. 26.* No minister shall in any wise admit to the receiving of the holy communion, any of his cure or flock, which be openly known to live in sin notorious without repentance; nor any who have maliciously and openly contended with their neighbours; nor any churchwardens or sidemen who refuse or neglect to make presentment of offences according to their oaths.

By *Can. 27.* No minister, when he celebrateth the communion, shall wittingly administer the same to any but to such as kneel, under pain of suspension; nor, under the like pain, to any that refuse to be present at publick prayers, according to the orders of the church of England; nor to any that are common and notorious depravers of the book of common prayer and administration of the sacraments, and of the orders rites and ceremonies therein prescribed; or of any thing that is contained in any of the 39 articles; or of any thing contained in the book of ordering priests and bishops; or to any that have spoken against and depraved his majesty's sovereign authority in causes ecclesiastical: except every such person shall first acknowledge to the minister before the churchwardens, his repentance for the same, and promise by word (if he cannot write) that he will do so no more; and except (if he can write) he shall first do the same under his hand-writing, to be delivered to the minister, and by him sent to the bishop of the diocese,

diocese, or ordinary of the place. Provided, that every minister so repelling any (as is specified either in this, or in the next preceding constitution) shall upon complaint, or being required by the ordinary, signify the cause thereof unto him; and therein obey his order and direction.

By *Can. 109.* If any offend their brethren, either by adultery, whoredom, incest, or drunkenness, or by swearing, ribaldry, usury, or any other uncleanness, or wickedness of life; such notorious offenders shall not be admitted to the holy communion, till they be reformed.

2. *Can. 71.* No minister shall administer the holy communion in any private house; except it be in times of necessity, when any being either to impotent as he cannot go to the church, or very dangerously sick, are desirous to be partakers of the holy sacrament: upon pain of suspension for the first offence, and excommunication for the second. Provided, that houses are here reputed for private houses, wherein are no chapels dedicated and allowed by the ecclesiastical laws of this realm. And provided also, under the pain before expressed, that no chaplains do administer the communion in any other places, but in the chapels of the said houses; and that also they do the same very seldom upon sundays and holidays: so that both the lords and masters of the said houses, and their families, shall at other times resort to their own parish churches, and there receive the holy communion at the least once every year.

Not to be administered in private houses.

3. *Can. 22.* We do require every minister to give warning to his parishioners publickly in the church at morning-prayer, the Sunday before every time of his administering that holy sacrament, for their better preparation of themselves: which said warning we enjoin the said parishioners to accept and obey, under the penalty and danger of the law.

Notice to be given of the holy communion.

And by the *rubrick*; The minister shall always give warning for the celebration of the holy communion, upon the Sunday, or some holiday immediately preceding.

4. *Rubr.* So many as intend to be partakers of the holy communion, shall signify their names to the curate, at least some time the day before.

Names to be given in the day before.

E. 13 Car. 2. An action upon the case was brought against a minister for refusing the sacrament to another, and the jury found for the plaintiff, and gave damages. And it was moved in arrest of judgment, among other things, that the party had not set forth in his declaration, that he gave notice according to the statute; nor that he was a parishioner of that parish; without which the minister

nister

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nister might not admit him by the laws of the church. But these points appear not to have come under consideration, because another exception was of itself adjudged to be fatal, viz. That the plaintiff declared for not administering two sundays, and had not set forth that in the second instance he desired the minister to do it, and yet intire damages had been given for both. 1 *Sid.* 34.

What number
is requisite for
communicating.

5. *Rubr.* There shall be no celebration of the Lord's supper, except there be a convenient number to communicate with the priest, according to his discretion.

And if there be not above twenty persons in the parish of discretion to receive the communion; yet there shall be no communion, except four (or three at the least) communicate with the priest.

And in cathedral and collegiate churches and colleges, where there are many priests and deacons, they shall all receive the communion with the priest every sunday at the least, except they have reasonable cause to the contrary.

Communion
table.

6. *Can.* 82. Whereas we have no doubt, but that in all churches convenient and decent tables are provided and placed, for the celebration of the holy communion; we appoint that the same tables shall from time to time be kept and repaired in sufficient and seemly manner, and covered in time of divine service with a carpet of silk or other decent stuff, thought meet by the ordinary of the place, if any question be made of it, and with a fair linen-cloth at the time of the ministration as becometh that table; and so stand, saving when the holy communion is to be administered, at which time the same shall be placed in so good sort within the church or chancel, as thereby the minister may be more conveniently heard of the communicants in his prayer and ministration, and the communicants also more conveniently and in more number may communicate with the said minister.

Bread and wine
to be provided.

7. By *Can.* 20. The churchwardens, against the time of every communion, shall at the charge of the parish, with the advice and direction of the minister, provide a sufficient quantity of fine white bread, and of good and wholesome wine, for the number of communicants that shall receive there; which wine shall be brought to the communion table, in a clean and sweet standing pot or stoop of pewter, if not of purer metal.

And by the *rubrick*: The bread and wine for the communion shall be provided by the curate and churchwardens at the charges of the parish.

In

In the case of *Franklyn* and the master and brethren of *St. Crofs*: *T.* 1721. Altho' by the endowment the vicar was to find the sacrament wine; yet the court were of opinion it should be found by the parishioners, according to the canon. *Bunb.* 79.—It had been better to have said, according to the rubrick; which is established by act of parliament.

And to take away all occasion of dissention and superstition, which any person hath or might have concerning the bread and wine; it shall suffice that the bread be such as is usual to be eaten, but the best and purest wheat bread that conveniently may be gotten.

8. In the rubrick in the communion service of the 2 *Ed.* 6. *Offertory.* it was ordained, that “ whyles the clearkes do syng the offertory, so many as are disposed, shall offer to the poore “ mennes boxe, every one according to his habilitie and “ charitable mynde.”

And by the present rubrick: Whilst the sentences of the offertory are in reading, the deacons, churchwardens, or other fit person appointed for that purpose, shall receive the alms for the poor, and other devotions of the people, in a decent basin to be provided by the parish for that purpose, and reverently bring it to the priest, who shall humbly present and place it upon the holy table.

And after divine service is ended, the money given at the offertory shall be disposed of to such pious and charitable uses, as the minister and churchwardens shall think fit; wherein if they disagree, it shall be disposed of as the ordinary shall appoint.

9. *Rubr.* Such ornaments of the church, and of the habit of the ministers thereof, at all times of their ministration, shall be retained and be in use, as were in the church of England by the authority of parliament in the second year of the reign of king Edward the sixth.

And by the rubrick of the 2 *Ed.* 6. it is ordained, that upon the day and at the time appointed for the ministration of the holy communion, the priest that shall execute the holy ministry shall put upon him the vesture appointed for that ministration, that is to say, a white albe plain, with a vestment or cope: and where there be many priests or deacons, there so many shall be ready to help the priest in the ministration, as shall be requisite; and shall have upon them likewise the vestures appointed for their ministry, that is to say, albes with tunacles.

And whensoever the bishop shall celebrate the holy communion in the church, or execute any other publick ministration;

tration; he shall have upon him, besides his rochet, a surplice or albe, and a cope or vestment, and also his pastoral staff in his hand, or else born or holden by his chaplain.

Consecration.

10. *Art.* 28. Transubstantiation (or the change of the substance of bread and wine) in the supper of the Lord cannot be proved by holy writ; but it is repugnant to the plain words of scripture, overthroweth the nature of a sacrament, and hath given occasion to many superstitions.

And by the statute of the 25 C. 2. c. 2. the declaration required as a qualification for offices is as follows: "I
" A.B. do declare, that there is not any transubstantiation
" in the sacrament of the Lord's supper, or in the elements
" of bread and wine, at or after the consecration thereof
" by any person whatsoever."

Poſture of the
communicants.

11. By *Can.* 27. No minister, when he celebrateth the communion, shall wittingly administer the same to any but so such as kneel; under pain of suspension.

And by the *rubrick* at the end of the communion office: Whereas it is ordained in this office for the administration of the Lord's supper, that the communicants should receive the same kneeling. (which order is well meant for a signification of our humble and grateful acknowledgment of the benefits of Christ therein given to all worthy receivers, and for the avoiding of such profanation and disorder in the holy communion as might otherwise ensue,) yet lest the same kneeling should by any persons, either out of ignorance and infirmity, or out of malice and obstinacy be misconstrued and depraved; it is here declared, that thereby no adoration is intended, or ought to be done, either unto the sacramental bread and wine there bodily received, or unto any corporal presence of Christ's natural flesh and blood; for the sacramental bread and wine remain still in their very natural substances, and therefore may not be adored (for that were idolatry, to be abhorred of all faithful christians); and the natural body and blood of our saviour Christ are in heaven, and not here; it being against the truth of Christ's natural body, to be at one time in more places than one.

Communion in
both kinds.

12. *Art.* 30. The cup of the Lord is not to be denied to the lay people; for both the parts of the Lord's sacrament, by Christ's ordinance and commandment, ought to be ministered to all christian men alike.

And by the statute of the 1 Ed. 6. c. 1. Forasmuch as it is more agreeable to the first institution of the said sacrament,

ment, and more conformable to the common use and practice of the apostles and of the primitive church for above 500 years after Christ's ascension, that the same should be administered under both the kinds of bread and wine, than under the form of bread only; and also it is more agreeable to the first institution of Christ, and to the usage of the apostles and the primitive church, that the people should receive the same with the priest, than that the priest should receive it alone: it is therefore enacted, that the said most blessed sacrament be commonly delivered and ministered unto the people, under both the kinds, that is to say, of bread and wine, except necessity otherwise require. And also that the priest which shall minister the same, shall at the least one day before, exhort all persons which shall be present, likewise to resort and prepare themselves to receive the same. And when the day prefixed cometh, after a godly exhortation by the minister made (wherein shall be further expressed the benefit and comfort promised to them which worthily receive the holy sacrament, and danger and indignation of God threatened to them which shall presume to receive the same unworthily, to the end that every man may try and examine his own conscience before he shall receive the same) the said minister shall not without a lawful cause deny the same to any person that will devoutly and humbly desire it.——Not condemning hereby, the usage of any church out of the king's dominions. s. 7.

13. *Rubr.* If any of the bread and wine remain unconsecrated, the curate shall have it to his own use; but if any remain of that which was consecrated, it shall not be carried out of the church, but the priest, and such other of the communicants as he shall then call unto him, shall immediately after the blessing, reverently eat and drink the same. Bread and wine remaining.

14. By a constitution of archbishop Langton, it is enjoined, that no sacrament of the church shall be denied to any one, upon the account of any sum of money: but if any thing hath been accustomed to be given by the pious devotion of the faithful, justice shall be done thereupon to the churches by the ordinary of the place afterwards. Lind. 278. Oblations due to the minister.

Upon the account of any sum of money] Used to be paid or taken in the administration of any of the sacraments. *Id.*

Hath been accustomed to be given] That is, of old, and for so long time as will create a prescription, altho' at first given voluntarily; for they who have paid so long, are presumed

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presumed at first to have bound themselves voluntarily thereunto. *Id.*

And by the *rubrick*: Yearly at easter, every parishioner shall reckon with the parson vicar or curate, or his or their deputy or deputies; and pay to them or him all ecclesiastical duties, accustomably due then and at that time to be paid.

How often in
the year to be
administred.

15. By the ancient *canon law*, every layman (not prohibited by crimes of a heinous nature) was required to communicate at least thrice in the year, namely, at easter, whitfuntide, and christmas; and the secular clergy not communicating at those times, were not to be reckoned amongst catholicks. *Gibb. 387.*

And by the *rubrick* in the book of common prayer; every parishioner shall communicate at the least three times in the year, of which easter to be one.

And by *Can. 21.* In every parish church and chapel where sacraments are to be administred, the holy communion shall be administred by the parson vicar or minister, so often, and at such times, as every parishioner may communicate at the least thrice in the year, whereof the feast of easter to be one: according as they are appointed by the book of common prayer.

And the churchwardens or questmen, and their assistants, shall mark (as well as the minister) whether all and every of the parishioners come so often every year to the holy communion, as the laws and constitutions do require. *Can. 28.*

And shall yearly within forty days after easter exhibit to the bishop or his chancellor, the names and surnames of all the parishioners as well men as women, which being of the age of sixteen years received not the communion at easter before. *Can. 112.*

By *Can. 24.* All deans, wardens, masters or heads of cathedral and collegiate churches, prebendaries, canons, vicars, petty canons, singing men, and all others of the foundation, shall receive the communion four times yearly at the least

And by *Can. 23.* In all colleges and halls within both the universities, the masters and fellows, such especially as have any pupils, shall be careful that all their said pupils, and the rest that remain among them, do diligently frequent publick service and sermons, and receive the holy communion, which we ordain to be administred in all such colleges and halls, the first and second sunday of every month; requiring all the said masters fellows and scholars,

and all the rest of the students, officers, and all other the servants there, so to be ordered, that every one of them shall communicate four times in the year at the least, kneeling reverently and decently upon their knees, according to the order of the communion book prescribed in that behalf.

16. By the 1 Ed. 6. c. 1. Whosoever shall deprave despise or contemn the most blessed sacrament of the body and blood of our Saviour Jesus Christ, commonly called the sacrament of the altar, and in scripture the supper and table of the Lord, the communion and partaking of the body and blood of Christ, in contempt thereof, by any contemptuous words, or by any words of depraving despising or reviling, or whosoever shall advicedly in any other wise contemn despise or revile the said most blessed sacrament, contrary to the effects and declaration above-said; shall suffer imprisonment of his body, and make fine and ransom at the king's will. And the justices of the peace, or three of them at least; whereof one to be of the quorum, shall have power to take information and accusation by the oaths of two witnesses; and after such accusation or information so had, to inquire by the oaths of twelve men, in every their four quarter sessions yearly to be holden, of all and singular such accusations or informations to be had or made of any the offences afore-said; and upon every such accusation and information, the offender shall be inquired of and indicted before the said justices, or three of them as afore-said, of the said contempt and offences, by the verdict of twelve men, if the matter of the said accusation and information shall seem to the said jury good and true. s. 1.

And the said justices, or three of them as afore-said, before whom any such presentment information and accusation shall be made, shall examine the accusers what other witnesses were by and present at the time of the committing the offence, and how many others than the accusers have knowledge thereof; and shall have power by their discretion, to bind by recognizance as well the said accusers, as all such other persons whom the said accusers shall declare to have knowledge of the offences by them presented and informed, every of them in 5 l. to the king to appear before the said justices before whom the offender shall be tried at the day of trial and deliverance of such offender. s. 2.

And the said justices, or three of them as afore-said, shall have power to make process against every person so indicted,

Lord's supper.

indicted, by two *capias's* and an exigent and by *capias utlagatum* into all the places within this realm; and upon the appearance of the offender, to determine the offences aforesaid: and the said justices, or three of them as aforesaid, shall have power to let any such person so indicted, upon sufficient sureties by their discretion, to bail for their appearance to be tried. f. 3.

Provided, that the said justices at their quarter sessions where any offender shall be or stand indicted of any of the said offences shall direct a writ in the king's name to the bishop of the diocese wherein the offence is supposed to be committed, willing and requiring the said bishop to be in his own person, or by his chancellor, or other his sufficient deputy learned, at the quarter sessions in the said county to be holden, when and where the said offender shall be arraigned and tried, appointing to them in the said writ the day and place of the said arraignment; which writ shall be of this form: "The king, &c. to the bishop of ——— greeting. We command you, that you, your chancellor, or other your deputy sufficiently learned, be with our justices assigned to keep the peace within our county of ——— such a day, at our session then and there to be holden, to give counsel and advisement to the same our justices assigned to keep the peace as aforesaid, upon the arraignment and delivery of the offenders, against the form of the statute concerning the holy sacrament of the altar." f. 4.

Provided, that no person shall be indicted for any the said offences, but within three months next after the offence committed. f. 5.

And in all trials for such offences before the said justices, the person complained of and arraigned shall be admitted to purge or try his innocency, by as many or more witnesses in number, and of as good honesty and credence, as the witnesses be which deposed against him. f. 6.

Service when
there is no com-
munion.

17. *Rubr.* Upon the sundays and other holidays (if there be no communion) shall be said all that is appointed at the communion, until the end of the general prayer for the whole state of Christ's church militant here in earth, together with one or more of the collects there following; concluding with the blessing.

Mahometans.

Mahometans.

MR. Hawkins says, it seems to be agreed to be a good exception to a witness, that he is an infidel: that is, that he believes neither the old nor new testament to be the word of God, on one of which our laws require the oath should be administered. 2 *Haw.* 434.

Nevertheless, infidels in some cases have been admitted to give evidence.

Thus in the case of *Onichund and Barker*, in the court of chancery, a Mahometan was sworn upon the Koran. 2 *Eq. Caf. Abr.* 397.

And *M.* 12 G. 2. At the council, Dec. 9, 1738. Presented the two chief justices. On a complaint of *Jacob Fachina* against general *Sabine*, as governor of *Gibraltar*; *Ald. ramon Ben M. 10*, a Moor, was produced as a witness, and sworn upon the Koran. *Str.* 1104.

Markets. See Church.

Marriage.

CONCERNING marrying again, the former husband or wife being living; see Tit. *Polygamy*.

Concerning a man marrying a second wife, the former wife being dead; or marrying a widow; see Tit. *Polygamy*.

Having first premised, that the statute of the 26 G. 2. *ch.* 33. which will often occur in the following sections, doth not extend to the marriages of the royal family; nor to Scotland; nor to any marriages amongst the people called quakers, or amongst persons professing the jewish religion, where both the parties are quakers or jews respectively; nor to any marriages beyond the seas. *s.* 17, 18. I will treat of the matters contained under this title in the following order:

I. *Who may marry.*

II. *Of marriage contracts.*

III. *Of banns.*

VOL. II.

F f

IV. *Of*

IV. Of licence.

V. When and where to be solemnized; and therein of clandestine marriages.

VI. Form of solemnization.

VII. Fee for marriage.

VIII. Register of marriage.

IX. Certificate of marriage.

X. Trial of marriage.

XI. Divorce.

XII. Alimony.

XIII. Elopement.

I. Who may marry.

1. **EDM.** Where there is not the consent of both parties, it is no marriage. Therefore they who give girls unto boys in their infancy, do nothing; unless both parties shall consent after they come to the age of discretion. Therefore we do prohibit, that from henceforth us persius, inhibemus ne de cetero aliqui, &c. shall be joined together, where both or either of the parties shall not have arrived to the age appointed by the laws and customs; unless such contrivance shall be dispensed with, in case of necessity, for the public welfare. Lind. 272.

Where there is no, &c. This constitution is taken out of the decretals (c.) and was from thence transferred into the body of the English laws, in the council at Westminster, in the year 1175. Gl. 215.

Girls not to be married before. That is under the age of seven years. Lind. 272.

Discreting. That is, as to the bond of matrimony: nor even as to copulation, unless after the seventh year it shall appear, either by word or deed, that they continue in the same mind: for then, from such willingness or consent, copulations do begin between them. For if after the seventh year consent, both parties do continue in the same mind, the sufficientness is to copulate. Lind. 272.

When both parties shall not be able to consent at years of discretion. The time of agreement or disagreement, when

12. See C. 10. 2. and 2. 1. 1. 1.

they

they marry within the marriageable years, is for the woman at twelve or after, and for the man at fourteen or after; and there needs no new marriage, if they then agree. But disagree they cannot before the said ages; and then they may disagree, and marry again to others without any divorce: and if they once after give consent, they can never disagree afterwards. If a man of the age of fourteen marry a woman of the age of ten, at her age of twelve he may as well disagree as she may, though he were at the age of consent; because in contracts of matrimony, either both must be bound, or equal election or disagreement given to both: and so on the contrary, if the woman be of the age of consent, and the man under.
1 Inst. 79.

Age determined by the laws and canons] Which, as to espousals (as hath been said) is the age of seven years, when infancy endeth, both in the one party and in the other; and which, as to finishing the contract, is the age of twelve in the woman, and of fourteen in the man.
Lindw. 272. (b)

By the laws of this realm, if a woman during her minority be married to a man seised of lands or tenements, in fee simple or fee tail, by purchase or descent, she shall be endowed of the third part of such lands and tenements, so that she have accomplished the age of *nine* years at her husband's death. *Swinb. Matr. Con.* c. 7.

In cases of necessity] Of which necessity the diocesan, without whose licence they ought not to contract matrimony, shall be the judge. *Lindw.* 272.

For the public welfare] As where two princes conclude a peace, and for the more assured confirmation thereof, match their children in marriage: this marriage the laws do tolerate as lawful, being made upon such urgent cause, although otherwise for divers wants the same were unlawful. *Swinb.* c. 7.

(b) In this respect the canon and civil law agree. *A primordio ætatis sponsalia effici possunt, si modo id fieri ab utraque persona intelligatur, id est, si non sint minores quam septem annis. Dig.* 23. 1. 14. Justinian, in defining who may contract matrimony, requires that the parties be *masculi quidem puberes; femine autem viri potentes*; *Inst.* 1. 10. having before declared *femine post impletos duodecim annos omnimodo pubescere judicantur, et mares post excessum quatuordecim annorum puberes existimantur. Cod.* 5. 60. 3.

And by the 26 G. 2. c. 33. which layeth sundry restraints upon marriages, the marriages (as hath been said) of the royal family are excepted. s. 17. (c)

Consent of parents or guardians.

2. Marriages that are made contrary to the consent of parents, are pronounced to be invalid both by the canon and civil law; and the church did sometimes anathematize such as married without the consent of parents. But yet when sons and daughters arrive at a competent age, and are endowed with the use of strong reason, they may of themselves contract marriage without this consent: for it is reasonable that children should be left at liberty in nothing more than in marriage, because their future happiness in this life depends upon it. By the civil law indeed, an emancipated son might have contracted marriage without his father's consent: but a son, under the power of his father, could not do it without his father's approbation. And as children owe a reverential obedience to their parents, sons at this day under twenty-five years of age, and daughters under twenty, are, in Holland and other countries governed by the civil law, forbidden to marry without their parents consent. But if they exceed the said respective ages, the bare dissent of parents, without a sufficient cause, is not a legal impediment to hinder them from contracting marriage. *Ayl. Par.* 362. (d)

But

(c) But by the 12 G. 2. c. 11. No descendant of his late majesty Geo. II. (other than the issue of princesses married or who may marry into foreign families) shall be capable of contracting matrimony without the previous consent of his majesty, his heirs, &c. signified under the great seal, declared in council, and entered in the privy-council books; and every marriage of any such descendant, without such consent, shall be null and void. But in case any descendant of Geo. II. being above sixteen years of age, shall pretend to contract a marriage disapproved of by his majesty, such descendant, after giving twelve months notice to the privy council, may contract such marriage, and the same may be duly solemnized, without the previous consent of his majesty; and such marriage shall be good except both houses of parliament shall, before the expiration of the said twelve months, declare their disapprobation thereof. And persons who shall wilfully solemnize, or assist at the celebration of such marriage, without such consent, shall, on conviction, incur the penalties provided by the statute of *præsumptio*, 10 R. 2.

(d) By the civil law, as fixed by the emperor Justinian, the previous consent of those parents in whose *potestas* *potestas* the

But by the law of England, full age is when a person, either male or female, hath attained to the age of twenty-one years compleat. And accordingly, by the 26 G. 2. c. 33. it is enacted as follows; viz. *All marriages solemnized by licence where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, which shall be had without the consent of the father of such of the parties so under age (if then living) first had and obtained: or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and if there shall be no such guardian, then of the mother, if living and unmarried; or if there be no mother living and unmarried, then of a guardian or guardians of the person appointed by the court of chancery — shall be void.* s. 11.

the children were, was necessary to enable them to contract matrimony. The necessity of this consent arose from two sources; 1. from the general reverence due by children to parents, which is a principle common to all nations: 2. from the nature and rights of that *patria potestas*, which was peculiar to the Roman system of jurisprudence. Hence it is very properly said in the Institutes, that the consent of parents, *et civilis et naturalis ratio suadet.* 1. 10. *in proem.* If the child was a female, by the contract of marriage she passed from the power of her father or grandfather, to that of her husband or his progenitor. The consent of her parent, therefore, was necessary to a measure which deprived him of so important a right. Sons, indeed, remained subject to paternal power notwithstanding their marriage; but here again reasons peculiar to the civil law rendered the consent of the parent requisite; for the law, at the same time that it gave power to the parent, bestowed very important rights on the children, while they remained in that power, they being *sui et necessarii heredes*. It therefore considered it as a very great hardship to have such an heir imposed on the head of the family against his consent. *Inst.* 1. 11. 7. *Dig.* 4. 15. 12. § 3. These latter reasons do not apply to the jurisprudence of those nations who derive their origin from the Germans, to whom this *patria potestas* was unknown, and with whom the marriage of children of either sex operated as an emancipation from parental authority. See on this subject, *Heineccius Elem. Jur. Germ. Lib. 1. § 164. 168. Sander Decis, Lib. 1. Tit. 7. Def. 5. & Vinnius ad Inst. 1. 9.* Any restraints, therefore, which have been laid upon marriage by them, have proceeded solely from a regard to the publick good, by preventing unwary youth from being inveigled into improper connections; and a desire to protect the internal peace of families, which must be severely wounded by imprudent contracts of this nature.

But whereas it may happen that the guardian or mother of any such party to be married, being so under age as aforesaid, may be non compos mentis, or may be in parts beyond the seas, or may be induced unreasonably and by undue motives to abuse the trust reposed in them by refusing their consent to a proper marriage: it is therefore enacted, that in case any such guardian or mother, whose consent is made necessary as aforesaid, shall be non compos mentis, or beyond sea, or withhold his or her consent to the marriage of any person, such person desirous to marry may apply by petition to the lord chancellor, who may proceed upon such petition in a summary way; and if the marriage proposed shall on examination appear to be proper, he shall judicially declare the same to be so, by an order of court; and such order shall be as effectual, as if such guardian or mother had consented. s. 12.

And by *Can. 62.* No minister, upon pain of suspension for three years ipso facto, shall celebrate matrimony between any persons when banns are thrice asked, and no licence in that respect necessary; before the parents or governors of the parties to be married, being under the age of twenty and one years, shall either personally, or by sufficient testimony, signify to him their consents given to the said marriage.

Pursuant to which canon, about the year 1725, Mr. Bridgen, curate of Shoreditch, London, having married a couple by banns published in that church, and they appearing not to be of age, was articled against before the chancellor of London (Dr. Henchman), and had sentence against him as being guilty of a breach of the canon. Mr. Bridgen, being a man of character, and it appearing that he was imposed upon; the chancellor and bishop of London were willing to have mitigated the penalty. But upon a consultation at doctors commons, it was agreed, that the canon having fixed a penalty, without leaving any power in the judge to mitigate it; he could only be pronounced guilty of a breach of the canon, and must undergo the penalty of it. Mr. Bridgen appealed to the arches; where, after deliberation, the sentence was confirmed. Then he petitioned the archbishop of Canterbury for a dispensation of the canon: but it was agreed by all the civilians, that as the father of the young man had been at the expence of prosecuting, and Mr. Bridgen was convicted of a breach of the canon, he had a right to have lawful punishment thereby directed to be inflicted. And Mr. Bridgen could have no relief. But if there had only been a necessary promoter, or an ex officio process; they

were of opinion it might be taken off discretionally, as no person could be injured by it.

And the late archdeacon Sharpe, in his visitation charges, is of opinion, that it is the minister's duty to be himself assured of the age, or consent of the parents of the parties, before he marries any couple even by banns; otherwise he will be guilty of a breach of the canon. p. 291.

But now by the statute of the 26 G. 2. c. 33. No minister solemnizing marriages between persons, both or one of whom shall be under the age of twenty-one years, after banns published, shall be punishable by ecclesiastical censures, for solemnizing such marriages without consent of parents or guardians, whose consent is required by law, unless he shall have notice of the dissent of such parents or guardians. And in case the parents or guardians or one of them, of either of the parties who shall be under the age of twenty-one years, shall openly and publicly declare or cause to be declared in the church or chapel where the banns shall be so published, at the time of such publication, his dissent to such marriage; such publication of banns shall be void. s. 3.

3. By the 25 H. 8. c. 22. (which Dr. Gibson says is *Levitical* repealed by the 28 H. 8. c. 7. s. 3. and by the 1 Mar. sess. 2. c. 1. and which Mr. Cay takes notice of as repealed, but which Mr. Hawkins inserts in his edition of the statutes, as being in force and unrepealed) it is enacted as follows: *Since many inconveniencies have fallen by reason of marrying within the degrees of marriage prohibited by God's laws, that is to say, the son to marry the mother or the step-mother, the brother the sister, the father the son's daughter or his daughter's daughter, or the son to marry the daughter of his father procreate and born by his stepmother, or the son to marry his aunt being his father's or mother's sister, or to marry his uncle's wife, or the father to marry his son's wife, or the brother to marry his brother's wife, or any man to marry his wife's daughter or his wife's son's daughter or his wife's daughter's daughter or his wife's sister; which marriages, albeit they be prohibited by the laws of God, yet nevertheless at some time they have proceeded under colour of dispensation by man's power; it is enacted, that no person shall from henceforth marry within the said degrees.* s. 3, 4.

Provided, that this article concerning prohibitions of marriages within the degrees aforementioned, shall always be taken and interpreted of such marriages, where marriages were solemnized, and carnal knowledge was had. s. 14.

And by the 28 H. 8. c. 7. (which is not in Mr. *Hawkins's* nor in Mr. *Cay's* collection, and which Dr. *Gibson* thinketh to be repealed; but which *Vaughan* and *Ventris*, in the case of *Harrison* and *Burwell* hereafter following, do suppose and argue to be unrepealed) it is in like manner enacted thus: *Since many inconveniencies have fallen, by reason of the marrying within the degrees of marriage prohibited by God's law, that is to say, the son to marry the mother, or the stepmother carnally known by his father; the brother the sister; the father his son's daughter, or his daughter's daughter; or the son to marry the daughter of his father, procreate and born by his stepmother; or the son to marry his aunt, being his father's or mother's sister; or to marry his uncle's wife, carnally known by his uncle; or the father to marry his son's wife, carnally known by his son; or the brother to marry his brother's wife, carnally known by his brother; or any man married, and carnally knowing his wife, to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister.* s. 9.

And further to declare the meaning of these prohibitions, it is to be understood, that if it chauce any man to know carnally any woman, that then all and singular persons, being in any degree of consanguinity or affinity as is above written to any of the parties so carnally offending, shall be deemed to be within the cases and limits of the said prohibitions of marriage: all which marriages, altho they be prohibited by the laws of God, yet sometimes have proceeded under colour of dispensations of man's power; it is enacted, that from henceforth no person shall marry within the degrees afore rehearsed. s. 10, 11.

And by the 32 H. 8. c. 38. (which was repealed in part by the 2 & 3 Ed. 6. c. 23. and was repealed in the whole by the 1 & 2 P. & M. c. 8. s. 19. but was again revived in part by the 1 El. c. 1. s. 11, 12. and so left as it stood upon the 2 & 3 Ed. 6. c. 23. as hereafter followeth) All such marriages as shall be contracted between lawful persons (as by this act we declare all persons to be lawful, that be not prohibited by God's law to marry) such marriages being contracted and solemnized in the face of the church, and consummate with bodily knowledge, or fruit of children or child being born therein, between the parties so married, shall be deemed lawful, just and indisputable; notwithstanding any precontract not consummate with bodily knowledge, which either of the parties so married or both shall have made, with any other person, before the time of contracting that marriage which is solemnized and consummate, or whereof such fruit is ensued

sued or may ensue as aforesaid: and notwithstanding any dispensation, prescription, law, or other thing granted or confirmed by act, or otherwise; and no reservation, or prohibition, God's law except, shall trouble or impeach any marriage without the levitical degrees; and no person shall be admitted in the spiritual court to any process, plea, or allegation to the contrary.

And by the 2 & 3 Ed. 6. c. 23. before mentioned, it is thus enacted: *As concerning precontracts, the said statute of the 32 H. 8. c. 38. shall be repealed, and be of no force or effect, and be reduced to the estate and order of the king's ecclesiastical laws of this realm; so that when any cause or contract of marriage is pretended to have been made, it shall be lawful to the king's ecclesiastical judge of that place, to hear and examine the said cause, and (having the said contract sufficiently and lawfully proved before him) to give sentence for matrimony, commanding solemnization, cohabitation, consummation, and tractation as becometh man and wife to have, with inflicting all such pains upon the disobedients and disturbers thereof, as before the said statute he might have done.* s. 2.

Provided, that this act do not extend to make good any of the other causes, to the dissolution or disannulling of matrimony, which be in the said act spoken of and disannulled; but that in all other causes and other things therein mentioned, the said act do stand in force. s. 4.

The degrees specified in these statutes are particularly set forth in the eighteenth chapter of Leviticus, whereby not only degrees of kindred and consanguinity, but degrees of affinity and alliance do hinder matrimony. Which lord Coke illustrateth in this manner.

Of the man's part.

Degrees of kindred and consanguinity prohibited.	Degree of affinity or alliance prohibited.
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A man may not marry his

A man may not marry his

Mother.

Father's wife.

Father's sister.

Uncle's wife.

Mother's sister.

Father's wife's daughter.

Sister.

Brother's wife.

Daughter.

Wife's sister.

Daughter of his son or daughter.

Son's wife or wife's daughter.

Daughter of his wife's son or daughter.

Of

Of the woman's part.

A woman may not marry her

Father.
 Father's brother.
 Mother's brother.
 Brother.
 Son of her son or daughter.

A woman may not marry her

Mother's husband.
 Aunt's husband.
 Sister's husband.
 Husband's brother.
 Son of her husband's son or daughter.

And according hereunto a table was set forth, in the year 1563, as followeth:

An admonition to all such as shall intend hereafter to enter the state of matrimony godly and agreeable to the laws:

First, That they contract not with such persons as be hereafter expressed, nor with any of like degree, against the law of God, and the laws of the realm.

Secondly, That they make no secret contracts, without consent and counsel of their parents or elders, under whose authority they be, contrary to God's laws, and man's ordinances.

Thirdly, That they contract not anew with any other, upon divorce and separation made by the judge for a time, the laws yet standing to the contrary.

A man may not marry his

Secundus gradus in linea recta
ascendente,

<i>Conf. Avia.</i>	1 Grandmother.
<i>Affin. Avi relicta.</i>	2 Grandfather's wife.
<i>Affin. Projacerus, vel sacerus magna.</i>	3 Wife's grandmother.

Secundus gradus inæqualis
in linea transversali ascen-
dente,

<i>Conf. Amita.</i>	4 Father's sister.
<i>Conf. Matertera.</i>	5 Mother's sister.
<i>Affin. Patruj relicta.</i>	6 Father's brother's wife.
<i>Affin. Avuncul relicta.</i>	7 Mother's brother's wife.
<i>Affin. Amita uxoris.</i>	8 Wife's father's sister.
<i>Affin. Matertera uxoris.</i>	9 Wife's mother's sister.

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Primus gradus in linea recta
ascendente,

<i>Conf. Mater.</i>	10 Mother,
<i>Affin. Noverca.</i>	11 Stepmother.
<i>Affin. Socrus.</i>	12 Wife's mother,

Primus gradus in linea recta
descendente,

<i>Conf. Filia.</i>	13 Daughter.
<i>Affin. Privigna.</i>	14 Wife's daughter.
<i>Affin. Nurus.</i>	15 Son's wife.

Primus gradus æqualis in
linea transversali,

<i>Conf. Soror.</i>	16 Sister.
<i>Affin. Soror uxoris.</i>	17 Wife's sister.
<i>Affin. Fratris relicta.</i>	18 Brother's wife,

Secundus gradus in linea recta
descendente

<i>Conf. Neptis ex filio.</i>	19 Son's daughter.
<i>Conf. Neptis ex filia.</i>	20 Daughter's daughter.
<i>Affin. Pronurus, i. relicta nepotis ex filio.</i>	21 Son's son's wife.
<i>Affin. Pronurus, i. relicta nepotis ex filia.</i>	22 Daughter's son's wife.
<i>Affin. Privigni filia.</i>	23 Wife's son's daughter.
<i>Affin. Privignæ filia.</i>	24 Wife's daughter's daughter.

Secundus gradus inæqualis
in linea transversali de-
scendente,

<i>Conf. Neptis ex fratre.</i>	25 Brother's daughter.
<i>Conf. Neptis ex sorore.</i>	26 Sister's daughter.
<i>Affin. Nepotis ex fratre relicta.</i>	27 Brother's son's wife.
<i>Affin. Nepotis ex sorore relicta.</i>	28 Sister's son's wife.
<i>Affin. Neptis uxoris ex fratre.</i>	29 Wife's brother's daughter.
<i>Affin. Neptis uxoris ex sorore.</i>	30 Wife's sister's daughter.

A woman may not marry with her

Secundus gradus in linea
recta ascendente,

3 Grandfather.

Conf. Avus.

2 Grand-

- 2 Grandmother's husband.
3 Husband's grandfather.

Affin. Avia relictus.

Affin. Prosocer, vel socer magnus.

Secundus gradus inæqualis
in linea transversali ad-
cendente,

- 4 Father's brother.
5 Mother's brother.
6 Father's sister's husband.
7 Mother's sister's husband.
8 Husband's father's brother.
9 Husband's mother's brother.

Cons. Patruus.

Cons. Avunculus.

Affin. Amitæ relictus.

Affin. Materteræ relictus.

Affin. Patruus mariti.

Affin. Avunculus mariti.

Primus gradus in linea recta
ascendente,

- 10 Father.
11 Stepfather.
12 Husband's father.

Cons. Pater.

Affin. Vitricus.

Affin. Socer.

Primus gradus in linea recta
descendente,

- 13 Son.
14 Husband's son.
15 Daughter's husband.

Cons. Filius.

Affin. Privignus.

Affin. Gener.

Primus gradus æqualis in
linea transversali,

- 16 Brother.
17 Husband's brother.
18 Sister's husband.

Cons. Frater.

Affin. Levir.

Affin. Sororis relictus.

Secundus gradus in linea
recta descendente,

- 19 Son's son.
20 Daughter's son.
21 Son's daughter's husband..

Cons. Nepos ex filio.

Cons. Nepos ex filia.

*Affin. Progener, i. relictus neptis ex
filio.*

- 22 Daughter's daughter's husband.

*Affin. Progener, i. relictus neptis ex
filia.*

- 23 Husband's son's son.
24 Husband's daughter's son.

Affin. Privigni filius.

Affin. Privignæ filius.

Secundus gradus inæqualis
in linea transversali de-
scendente,

- 25 Brother's son.

Cons. Nepos ex fratre.

26 Sister's

26 Sister's son.	<i>Conf. Nepos ex filior.</i>
27 Brother's daughter's husband.	<i>Affin. Nepos ex fratre relictus.</i>
28 Sister's daughter's husband.	<i>Affin. Neptis ex sorore relictus.</i>
29 Husband's brother's son.	<i>Affin. Leviro filius, i. nepos mariti ex fratre.</i>
30 Husband's sister's son.	<i>Affin. Gloris filius, i. nepos mariti ex sorore.</i>

1. It is to be noted, that those persons which be in the direct line ascendent and descendent, cannot marry together although they be never so far asunder in degree.

2. It is to be noted, that consanguinity and affinity (letting and dissolving matrimony) is contracted as well in them and by them which be of kindred by the one side, as in and by them which be of kindred by both sides.

3. Item, that by the laws, consanguinity and affinity (letting and dissolving matrimony) is contracted as well by unlawful company of man or woman, as by lawful marriage.

4. Item, in contracting between persons doubtful, which be not expressed in this table, it is most sure first to consult with men learned in the laws, to understand what is lawful, what is honest and expedient, before the finishing of their contracts.

5. Item, that no parson vicar or curate shall solemnize matrimony out of his or their cure or parish church or chapel, and shall not solemnize the same in private houses, nor lawless or exempt churches, under the pains of the law forbidding the same; and that the curate have their certificates, when the parties dwell in divers parishes.

6. Item, the banns of matrimony ought to be openly pronounced in the church by the minister, three several sundays or festival days; to the intent that who will and can alledge any impediment, may be heard, and that stay may be made till further trial, if any exception be made there against it, upon sufficient caution.

7. Item, Who shall maliciously object a frivolous impediment against a lawful matrimony, to disturb the same, is subject to the pains of the law.

8. Item, Who shall presume to contract in the degrees prohibited (though he do it ignorantly) besides that the fruit of such copulation may be judged unlawful, is also punishable at the ordinary's discretion.

9. Item, If any minister shall conjoin any such, or shall be present at such contracts making, he ought to be suspended

pended from his ministry for three years, and otherwise to be punished according to the laws.

10. Item, It is further ordained, that no person vicar or curate do preach treat or expound, of his own voluntary invention, any matter of controversy in the scriptures, if he be under the degree of a master of arts, except he be licensed by his ordinary thereunto, but only for the instruction of the people, read the homilies already set forth, and such other form of doctrine as shall be hereafter by authority published: and shall not innovate or alter any thing in the church, or use any old rite or ceremony, which be not set forth by publick authority.

So much concerning the table of degrees, which by reason of the canon here next following it hath been thought requisite to insert intire, together with the previous admonitions and the subsequent observations: although some of the said observations (as particularly that concerning the publication of banns on festival days) are now abrogated.

By which canon it is ordained, that *no person shall marry within the degrees prohibited by the laws of God, and expressed in a table set forth by authority in the year of our Lord 1563; and all marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so married shall by course of law be separated. And the aforesaid table shall be in every church publickly set up, at the charge of the parish.* Can. 99.

Before the said statute of the 32 H. 8. c. 38. other prohibitions than God's law admitteth, were invented by the court of Rome; the dispensation whereof they always reserved to themselves: as for instance, in kindred and affinity between cousin germans, and so to the fourth degree: as also, carnal knowledge of any of the same kin or affinity before in such outward degrees. But now by this act, all persons are declared to be lawful to contract matrimony, that be not prohibited by God's law to marry; and that no reservation or prohibition (God's law excepted) shall trouble or impeach any marriage without the levitical degrees. So as, without question, the son of the father by another wife, and the daughter of the mother by another husband, and so on the contrary, may marry. 2 I. 2. 684.

For the better understanding of which prohibitions, together with the grounds and limitations of them; it may not be improper to mention some special rules, which have

have been laid down for that end, both by lawyers and divines. As

First, that marriages in the ascending and descending line, that is, of children with their father, grandfather, mother, grandmother, and so upwards, are prohibited without limit; because they are the cause (immediate or mediate) of their being; and it is directly repugnant to the order of their nature, which hath assigned several duties and offices, essential to each, that would thereby be inverted and overthrown (*e*). A parent cannot obey a child; and therefore it is unnatural that a parent should be wife to a child: a parent as a parent, hath a natural right to command and correct a child; and that a child, as husband, should command and correct the same parent, is unnatural. To which we may add, the inconsistency, absurdity, and monstrousness of the relations to be begotten, if such prohibition were not absolute and unlimited. The son or daughter, for instance, born of the mother, and begotten by the son; considered as born of the mother, would be a brother or sister to the father; but as begotten by him, would be a son or daughter. So the issue procreate upon the grandmother, as born of the grandmother, will be uncles or aunts to the father; but as begot by the son, they will be sons or daughters to him, and this in the first degrees of kindred. *Gibf.* 412.

Further, there are several degrees, which although not expressly named in the levitical law, are yet prohibited by that, and by the statute of the 32 *El.* 8. *c.* 38. by parity of reason. Which is thus illustrated in the *reformatio legum* (*f*): This in the levitical degrees is to be observed, that all the degrees by name are not expressly set down; for the Holy Ghost there did only declare plainly and clearly such degrees, from whence the rest might evidently be de-

(*e*) See the opinion of the Judges delivered by C. J. Vaughan in the case of *Harrison v. Dr. Burwell*, 2 *Vent.* 18. *Vaugb.* 224. see also *Grotius de J. B. et P.* 2. *c.* 5. with which the Digest agrees: *jure gentium incestum committit, qui ex gradu ascendentium vel descendantium uxorem duxerit.* 23. 2. 68. And note, that the degrees prohibited by the levitical law are all within the 4th degree of consanguinity, as established by the computation of the civilians, explained in the table given by the author in title *Willis, Distribution*; all collaterals, therefore, in that degree or beyond it, may marry. See *Mr. Christian's note* to 1 *Bl. Com.* 435.

(*f*) *fo.* 23, *a.*

duced. As, for example, where it is prohibited that the son shall not marry his mother, it followeth also, that the daughter shall not marry her father. And by injoining that a woman shall not marry her father's brother; the like reason requireth that she shall not marry her mother's brother. To which the same book adds two particular rules, for our direction in this matter: 1. That the degrees which are laid down as to men, will hold equally as to women in the same proximity. 2. That the husband and wife are but one flesh; so that he who is related to the one by consanguinity, is related to the other by affinity in the same degree. *Gibf.* 412.

Upon the foregoing rule, from parity of reason (which is also acknowledged and laid down by the books of common law) rests the prohibition against marrying a wife's sister (g); which is well expressed by bishop *Jewel* in his printed letter upon that point: "Albeit (says he) I be not forbidden by plain words, to marry my wife's sister; yet I am forbidden so to do by other words, which by exposition are plain enough. For when God commands me that I shall not marry my brother's wife, it follows directly by the same; that he forbids me to marry my wife's sister. For between one man and two sisters, and one woman and two brothers, is like analogy or proportion." And when this point of marrying the wife's sister came under consideration in the court of king's bench, *M. 25 C. 2.* in the case of *Hill and Good*, though it was alledged, that the precept *prima facie* seemed to be only against having two sisters at the same time, and prohibition to the spiritual court was granted; yet in the Trinity term next following, after hearing civilians they granted a consultation, as in a matter within the statute of the 32 *H. 8.* though the former statute of the 28 *H. 8.* had never been revived, which yet it virtually was; and there, as in the statute of the 25 *H. 8.* the wife's sister is expressly prohibited. *Gibf.* 412. *Vaugb.* 302. 3 *Keb.* 166.

Upon the like parity of reason, in the case of *Wortley and Watkinson (H)*, a consultation was granted, where one had married the daughter of the sister of his former wife;

(g) 2 *Inst.* 683.

(c) 2 *Lev.* 254. 3 *Keb.* 660. 2 *Jan.* 118. 2 *Shower* 70.

which (as Sir John King laid the argument) is the same degree of proximity, as the nephew's marrying his father's brother's wife; and this being expressly prohibited, the other by parity of reason is so likewise; as it had been declared *E. 6 J.* in *Rennington's* case (*i*), before the high commissioners. Which point was again argued *T. 1 An.* in the case of *Snowling* and *Nursey* (*k*), and consultation granted as before, notwithstanding the case of *Richard Parsons* [mentioned by lord *Coke*, 1 *Inst.* 235, in which it was first determined not to be within the levitical degrees, and prohibition granted; but a consultation being awarded on debate two years after, that case is said to have been expunged out of the first institute, by order of the king and council. And this was the very point in which (presently after the making of the act) lord Cromwell desired a dispensation for one Massey, who was contracted to his sister's daughter of his late wife: but the archbishop denied it as contrary to the law of God, and gave for reason, that as several persons are prohibited, which are not expressed, but understood by like prohibition in equal degree; so in this case, it being expressed that the nephew shall not marry his uncle's wife, it is implied, that the niece shall not be married to the aunt's husband. *Gibf.* 412, 413.

Much less can it be doubted, whether the like rule concerning parity of reason, doth not forbid the uncle to marry his niece, which though not expressly forbidden, is virtually prohibited in the precept, that forbids the nephew to marry the aunt; nor is it of moment to allege, that the first is a more favourable case, as the natural superiority is preserved; since the parity of degree which is the proper rule of judging, is the very same. *Gibf.* 413.

But where, in the case of *Harrison* and *Burwell*, *T. 20 C. 2.* in the spiritual court, one had married the wife of his great uncle, this was declared not to be within the levitical degrees; and accordingly, after the opinion of all the judges taken by the king's special command, a prohibition was granted. *Gibf.* 413. (*l*)

By the civil law, first cousins are allowed to marry; but by the canon law, both first and second cousins (in order to make dispensations more frequent and necessary) are

(i) Cited in *Howard v. Bartlet*, *Hob.* 181.

(k) 2 *Lutw.* 1075.

(l) *Vaugb.* 206. 2 *Vent.* 9.

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prohibited. Therefore when it is vulgarly said that first cousins may marry, but second cousins cannot; probably this arose by confounding these two laws: for first cousins may marry by the civil law, and second cousins cannot by the canon law. *Wood Civ. L.* 118, 119. *Ayl. Par.* 364.

But now by the aforesaid statute of the 32 H. 8. c. 38. it is clear, that both first and second cousins may marry.

The kindred of the husband are not of affinity to the kindred of the wife; and therefore the husband's brother may marry the wife's sister, as well as the husband's son by a former wife may marry the wife's daughter by a former husband. The affinity is terminated in the husband himself from the wife's kindred, and in the wife herself from the husband's kindred. *Wood Civ. L.* 119.

H. 7 W. Hains and Jephcott. A day was appointed to hear counsel, why a prohibition should not be granted to the spiritual court of Worcester, to stay a suit against *Hains* for marrying with the *bastard* daughter of his sister. And it was argued for the prohibition, that this is not prohibited by any law, for there is neither affinity nor consanguinity, for a bastard is *nullius filius*. On the contrary it was argued, that the levitical law is *ad proximum sanguinis non accedat*; that the jews made no difference, as to marriage, between bastards and others; that though bastards are deprived of certain privileges by particular laws, yet the same reason prohibits them from marriage as others: and by this rule a man might marry his own bastard; which doubtless could not be allowed. And the court inclined not to grant a prohibition; but the cause was adjourned, and it appears not what became of it. *L. Raym.* 68. 5 *Mol.* 168. *Gibbs.* 413.

In the case of *Ellerton and Gastrel*: where Ellerton had married the daughter of the sister of his former wife, this was declared to be within the prohibition of the levitical degrees. *Gibbs.* 412. *Comyns.* 318.

If a man marry one within the degrees prohibited, the issue between them is not by the common law a bastard, until there be a divorce; for by that law, the marriage is not till then void. *God.* 486. (m)

Dumb persons.

4. They which be dumb, and cannot speak, may contract matrimony by signs; which marriage is lawful and available to all intents. *Swinb. Matr. Con.* f. 15.

5. Formerly, it was adjudged, that the issue of an idiot ^{Idiots and lunatics.} was legitimate, and consequently that his marriage was valid. 1 *Roll's Abr.* 357. But by later resolutions it hath been determined otherwise, because consent is absolutely requisite to marriage, and idiots are not capable of consenting to any thing. So also of a lunatic, unless the marriage was in a lucid interval: but as it may be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials, therefore the statute 15 G. 2. c. 30. hath provided, that the marriage of lunatics and persons under phrenzies (if found lunatics under a commission, or committed to the care of trustees by any act of parliament) before they are declared of sound mind by the lord chancellor or the majority of such trustees, shall be totally void. 1 *Black.* 439.

6. By the ancient law of England, if any christian Jew, man did marry with a woman that was a jew, or a christian woman did marry with a jew; it was felony, and the party so offending should be burnt alive. 3 *Inst.* 89.

The author of *Fleta* saith, that such offender should be buried alive. *Fleta* 54.

But where both parties are jews, they are allowed to marry; and are not under the restraints (as was before observed) of the statute of the 26 G. 2. c. 33.

7. By the civil law, the woman is forbidden to marry ^{Widows.} again, within the year (as it is called) of mourning, unless there is a special dispensation from the prince; by reason of the uncertainty to which husband the issue may belong, and because a reverential mourning and pious regard to the memory of her deceased husband is in decency expected. *Wood Civ. L.* 124. 2 *Demat.* 126.

And lord Coke says; for the avoiding of such like inconveniences, this was the law before the conquest—Let every widow continue unmarried for twelve months; and if she shall marry, let her lose her dower. 1 *Inst.* 8.

But the divine and the canon law leave no such injunctions. *Wood. Civ. L.* 122.

Also by the common law of England, a widow is not prohibited from marrying at any time after her husband's death (a).

(a) If a woman marry so soon after the death of her husband that the child may belong to either father, it is said the child shall chuse his father. *Co. Lit.* 8. a.

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8. *Langton*. Persons beneficed or in holy orders shall not presume to keep concubines publickly in their houses, nor elsewhere shall have publick access to them with scandal. If the concubines, after publick admonition, shall not depart; they shall be expelled from the churches which they shall so presume to defame, and they shall not be admitted to the sacraments. And if they still persist, let them be excommunicated, and the secular arm be invoked against them. And the clerks, after canonical admonition, shall be deprived of their office and benefice. *Lind.* 125.

Langton. If clergymen leave ought by their wills to concubines, it shall go to the church. *Lind.* 166.

Weiberfsaad. Clergymen under the office of subdeacon may keep their wives; but subdeacons or above shall leave their women whether such women do consent to it or not. *Lind.* 128.

Otho. Clergymen who publickly keep concubines shall put them away, on pain of suspension from their office and benefice. *Athon.* 41.

Othobon. None shall let houses to clerks who keep concubines. *Athon.* 92.

By the 1 *H.* 7. c. 4. It shall be lawful to all archbishops bishops and other ordinaries having episcopal jurisdiction, to punish and chastise priests clerks and religious men, being within the bounds of their jurisdiction, as shall be convicted before them by examination and other lawful proof requisite by the law of the church, of advourtry, fornication, incest, or any other fleshly incontinency, by committing them to ward and prison, there to abide for such time as shall be thought to their discretions convenient for the quality and quantity of their trespass.

By the 31 *H.* 8. c. 14. (which was altered by the 32 *H.* 8. c. 10. here next following, and which was finally repealed by the 1 *Ed.* 6. c. 12.) it was enacted as followeth: A priest keeping company with a *wife*, to the evil example of other persons; shall be guilty of felony, as shall also the woman. And if any priest shall keep a *concubine*, to the evil example of other persons; he shall forfeit his goods and spiritual promotions, and be imprisoned during the king's pleasure: and if he shall again offend, he shall be guilty of felony. And the women shall have like punishment as the priests.

By the 32 *H.* 8. c. 10. (which is repealed as to *wives* by the 2 & 3 *Ed.* 6. c. 21. here next following, but continues in its force as to *concubines* :) The penalties of the aforesaid statute of the 31 *H.* 8. are mitigated; and for

both offences alike, the priest shall *only* forfeit (as it is there expressed) for the first offence all his goods and spiritual promotions, except one; for the second offence, all his goods, and also during his life all the profits of his lands and of his spiritual promotions; and for the third offence, all his goods, and also during his life all the profits of his lands and of his spiritual promotions, and be imprisoned during life. And the woman offending, if she be unmarried, shall for the first offence forfeit all her goods; for the second offence, all her goods and half the issue of her lands during life; for the third offence, all her goods and the issues of all her lands during life, and imprisonment during life; if she be married, she shall for the first offence be imprisoned for all the term of her life, at the king's will and pleasure.

By the 2 & 3 Ed. 6. c. 21. (which was repealed by the 1 Mar. sess. 2. c. 2. and revived by the 1 J. c. 25.) All and every law and laws positive, canons, constitutions, and ordinances, heretofore made by authority of man only, which do prohibit or forbid marriage to any ecclesiastical or spiritual person or persons, of what estate condition or degree they be, or by what name or names soever they be called, which by God's law may lawfully marry, in all and every article branch and sentence concerning only the prohibition for the *marriage* of the persons aforesaid, shall be utterly void and of none effect.

And by the 5 & 6 Ed. 6. c. 12. (which also was repealed by the 1 Mar. sess. 2. c. 2. and revived by the 1 J. c. 25.) The matrimony of all and every priest and other ecclesiastical and spiritual person, which shall be duly had celebrated and made; shall be adjudged deemed and taken for true and lawful matrimony, to all intents constructions and purposes.

Note, that by these ancient canons, concubinage seemeth to have been partly connived at; only the publick avowance thereof was discouraged. And by the aforesaid statute of the 31 H. 8. marriage, of the two, is esteemed the greater offence; and by the 32 H. 8. both offences are rendered equal: the penalties of which latter statute (as was observed) do still continue in force with respect to *concubinage*, although by the 2 & 3 Ed. 6. they are abrogated as to *marriage*. And by the 5 & 6 Ed. 6. the clergy, as to the point of matrimony, are put upon the same footing with all other persons. In queen *Mary's* time, king *Edward's* laws being repealed, the clergy were again brought under the severe laws of king *Henry* 8. and so

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continued during all that reign, and (which is remarkable) during also the whole reign of queen *Elizabeth*. Yet nevertheless the thirty-nine articles were passed in convocation and confirmed by the royal authority in the fifth year of that queen, in the year of our Lord 1562; and ratified anew by her in the year 1571. The thirty-second of which articles is as follows:

Bishops, priests, and deacons are not commanded by God's law, either to vow the estate of single life, or to abstain from marriage; therefore it is lawful for them, as for all other christian men, to marry at their own discretion, as they shall judge the same to serve better to godliness.

- Which perhaps may be accounted for from this; that queen Elizabeth was always averse from the parliament's interfering in ecclesiastical affairs; and therefore might think that her sole allowance and ratification of this (amongst the other articles of religion) would be sufficient in this matter, without expressly repealing the statute of queen Mary. Or perhaps, in order to have the clergy more dependent, she might be willing that this matter should continue doubtful. However by the statute of the 1 J. c. 25. all foundation for any further question is taken away, which expressly revives the aforesaid statutes of *Ed. 6.* and so the law hath continued ever since.

Six clerks in
chancery.

9. By the 14 & 15 H. 8. c. 8. Whereas of old time accustomed hath been used in the high court of chancery, that all manner of clerks and ministers of the same court, writing to the great seal, should be unmarried (except only the clerk of the crown) so that as well the curfitors and other clerks, as the six clerks of the said chancery were by the same custom restrained from marriage, whereby all those that contrary to the same did marry were no longer suffered to write in the said chancery, not only to their great hindrance, losing thereby the benefit of their long study and tedious labours and pains of youth taken in the said court, but also to the great decay of the true course of the said court; and so farasmuch as now the said custom taketh no place nor usage, but only in the office of the said six clerks, but that it is permitted for maintenance of the said course, that as well the said curfitors as the other clerks aforesaid may and do take wives, and marry at their liberty, after the laws of holy church and of long time have so done, without interruption or let of any person: therefore in consideration of the premises, and for that the said custom is not grounded upon any law, it is enacted, that all persons who shall be in the office of the six clerks of the

the

the chancery, may take wives and marry at their liberty, after the laws of holy church; and shall hold their offices notwithstanding in as ample manner as if they had never been married.

10. By the 37 H. 8. c. 17. (which was repealed by Doctors of the 1 & 2 P. & M. c. 8. f. 27. and revived by the 1 E. civil law. c. 1. f. 19.) All persons, as well lay as those that be married, being doctors of the civil law, lawfully create and made in any university, who shall be constituted chancellor, vicar general, commissary, official, scribe or register, may lawfully execute and exercise all manner of jurisdiction, commonly called ecclesiastical jurisdiction, and all censures and coercions appertaining or in any wise belonging to the same, albeit such persons be lay, married, or unmarried; so that they be doctors of the civil law as aforesaid.

II. Of marriage contracts.

1. Spousals *de futuro*, are a mutual promise or covenant Spousal, what: of marriage to be had afterwards; as when the man saith to the woman, I will take thee to my wife, and she then answereth, I will take thee to my husband: Spousals *de presenti*, are a mutual promise or contract of present matrimony; as when the man doth say to the woman, I do take thee to my wife, and she then answereth, I do take thee to my husband. *Swinb. Matr. Con. l. 3.*

2. *Raynolds.* The ministers shall frequently denounce Not to be made to those who are desirous to contract matrimony; that on *privately.* pain of excommunication, they do not contract matrimony, but in an open place, and before divers witnesses in publick. *Lind. 271.*

3. Both by the civil and canon *law*, infants under *se-* Age for con-
ven years of age cannot contract any kind of spousals, *tracting.*
Swinb. l. 6.

From the age of seven, to the age of twelve as to the woman, and fourteen as to the man, they cannot contract matrimony *de presenti*, but only *de futuro.* *Swinb. l. 7.*

A man so soon as he hath accomplished the age of fourteen years, and a woman so soon as she hath accomplished the age of twelve years, may contract true and lawful matrimony. *Swinb. l. 9. (2)*

(2) *Vide supra, l. 1.*

But by *Can. 100.* no children under the age of one and twenty years compleat, shall contract themselves without the consent of their parents, or of their guardians and governors if their parents be deceased (p).

Part of the portion reserved.

4. By the civil law, the woman is not constrained to bring her whole substance as a portion to her husband; but may retain back part of her goods, which are then called *paraphernalia* (from *para* besides, and *perna dower*), in which the husband hath no interest: for she may dispose of it without his consent, and bring actions in her own name, or in the name of the husband, for recovering the same. *Wood Civ. L. 123. (q)*

In England we account the paraphernalia to be only the woman's wearing apparel, jewels, and personal ornaments, which she wore during her marriage; suitable to the quality of her husband. *Id. (r)*

And a wife after the death of her husband may claim her paraphernalia, or necessary apparel for her body, cloth given her to make a garment, and the like, besides her dower or jointure. But she shall not have excessive apparel, beyond her rank or degree. Pearl necklaces, chains of diamonds, gold watches, and such like, may be included under paraphernalia, if they were usually worn by the wife, and were suitable to her degree, according to the fashion of the times. 1 *Roll's Abr. 911. (s)*

5. Here-

(p) The parents or guardians of infants may prohibit the publication of banns. *Inf. III. 6.* And security is to be given that their consent has been obtained before a licence shall be granted by the Bishop. *Inf. IV. 3.*

(q) And for this the woman had a tacit hypothec over the goods of her husband, *Haber ad Dig. 22. 2. 2.*

(r) *Moor. 213. Crd. Car. 343. Dr. et Stud. 17. 2 Ccm. Dig. 561. 1 Bl. Com. 435.*

(s) The husband has an absolute property in the *bona paraphernalia* during the life of his wife, and may sell or give them away. *Noy's Max. 108.* But if he merely pledge them and die, leaving a sufficient estate to redeem the pledge and pay all his debts, she shall be entitled to the redemption of them, out of the husband's personal estate. *Grabam v. Londonderry, 3 Atk. 393.* By *Ld. Ch. Macclesfield* they are not devisable by the husband from the wife, any more than heirlooms from the heir. 1 *P. Wms. 729. Tipping v. Tipping.* And after his death she shall retain them against all persons, except creditors, where there are no assets. *Id. Northey v. Northey, 2 Atk. 77. 2 Fezzy, 7.* But during the lifetime of the husband she cannot, as by the civil law, will them away

5. Heretofore, if any having contracted matrimony *de presenti*, and being convented by the ecclesiastical judge, did refuse to execute the sentence given by him to celebrate the matrimony accordingly, after lawful admonition given him in that behalf; he or she so refusing might for their contumacy or disobedience therein be excommunicated, and be imprisoned on a writ *de excommunicato capiendo*, until he or she did submit to obey the monition of the ordinary in that behalf. *Swinb. l. 17.*

What remedy shall be upon the contract.

But for persons who had contracted spousals only *de futuro*, if either of them did refuse to perform their promise, the judge was not to proceed to the *significavit* into chancery for an *excommunicato capiendo*, but rather to absolve that cursed party which contemned the censures of the church, albeit there might be no cause of favour, but for fear of further mischief, by compelling them to go together which did hate one another; yet was not this froward party thus to be dismissed, but was to suffer penance for the breach of his promise: nor was he or she to be dismissed or absolved, if those spousals *de futuro* by reason of carnal knowledge of some other act equivalent did become matrimony; for in that case as in the former where spousals were contracted *de presenti*, the disobedient party was to be excommunicated, apprehended, and imprisoned; and not to be absolved or released before satisfaction, or death, or other just cause of divorce. *Id.*

But now by the 26 G. 2. c. 33. No suit or proceeding shall be had in any ecclesiastical court, in order to compel a celebration of any marriage *in facie ecclesie*, by reason of any contract of matrimony, whether *per verba de presenti*, or *per verba de futuro*. l. 13.

But notwithstanding, the party is not the less liable to damages for the same, in an action to be brought upon the case.

6. T. 5 & 6 G. 2. *Holt* against *Ward* clarencieux king at arms. Mrs. *Holt* the plaintiff declared, that it was mutually agreed between the defendant Mr. *Ward* and her-

Infant's contract, how far binding.

away without his consent. *Shep. Ab. 728.* In the case of *Tipping v. Tipping*, the real estate descended, and *Ld. Macclesfield* held the *paraphernalia* not applicable to pay debts, in the first instance, as personal property. But in *Probert and Clifford, Amb. 6.* the husband having devised his real estate after charging it with debts, and the personalty being exhausted, *Ld. Hardwicke* would not suffer the wife to have satisfaction for her *paraphernalia* out of the real assets, against such devisee. But see *Willis, V. 16.*

self,

self, that they should marry at a future day, which is past, and that in consideration of each other's promises, each engaged to the other; notwithstanding which he did not marry her, but had married another; which she lays to her damage of 4000*l*. The defendant, with leave of the court, pleaded double: viz. first, that he made no such promise: and secondly, that Mrs. *Holt* the plaintiff at the time of the promise was an infant of fifteen years of age. The plaintiff joins issue upon the former point, and a verdict was found for her, with 2000*l* damages; and as to the plea of infancy demurred. This cause was argued several times at the bar. Upon the first argument, the court were strongly inclined with the plaintiff, because though the defendant would not have the same remedy against her by action for damages, yet they thought he might have some remedy, to wit, by the ecclesiastical court to compel a performance, the plaintiff being of the age of consent, and that would be a sufficient consideration; and therefore appointed an argument by civilians, to see what their law would determine in such a case. Upon the argument of the civilians, no instance could be shewn, wherein they had compelled the performance of a minor's contract. And they who argued for the defendant strongly insisted, that in the case of a contract *per verba de futuro* (as this was), there was no remedy given against a person of full age in the spiritual court, but only an admonition: and the only reason why they hold jurisdiction in the case of a contract *per verba de presenti* was because that is looked upon amongst them to be *ipsum matrimonium*, and they only decree the formality of a solemnization in the face of the church. After their arguments, it was spoken to again. And now this term *Raymond* chief justice delivered the resolution of the court: the objection in this case is, that the plaintiff not being bound equally with the defendant, this is *nudum pactum*, and the defendant cannot be charged in this action. Formerly it was made a doubt by my lord Vaughan, whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. And as to the present case, we should have had no difficulty in giving judgment for the plaintiff, if we could have been satisfied by the arguments of the civilians, that as the plaintiff was of the age of consent, any remedy, tho' not by way of action for damages, could be had against her. But since they seem to have no precedent in the case, we must consider it upon the foot of the common

mon law. And upon that the single question is, whether this contract, as against the plaintiff, was absolutely void? And we are all of opinion, that this contract is not void, but only voidable at the election of the infant; and as to the person of full age, it absolutely binds. The contract of an infant is considered in law, as different from the contracts of all other persons. In some cases his contract shall bind him: such is the contract of an infant for necessities, and the law allows him to make this contract, as necessary for his preservation; and therefore in such a case a single bill shall bind him, though a bond with a penalty shall not. Where the contract may be for the benefit of the infant, or to his prejudice; the law so far protects him, as to give him an opportunity to consider it when he comes of age: and it is good, or voidable at his election. But tho' the infant hath this privilege; yet the party with whom he contracteth, hath not: he is bound in all events. And as marriage is looked upon as an advantageous contract, and no distinction holds whether the party suing be man or woman, but the true distinction whether it may be for the benefit of the infant; we think, that though no express case upon a marriage contract can be cited; yet it falls within the general reason of the law with regard to infants contracts. And no dangerous consequences can follow from this determination, because our opinion protects the infant even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts. For these reasons we are all of opinion, that the plaintiff ought to have her judgment upon the demurrer. *Str. 937. (1)*

7. *B. 3 An. Hatton and Mansfield.* It was held by *Holt* chief justice, that if there be an express promise by the man, and it appear the woman countenanced it, and by her actions at that time behaved herself as if she agreed to the matter, although there be no actual promise, yet

What consent shall amount to a contract.

(1) *Fitzg. 175. 275. 1 Barn. B. R. 277. 333. 348. 455. 2 Barn. 12. 173. 176.* See also *3 Atk. 306.* But the contract of an infant, with consent of guardians, on a marriage settlement, shall bind the infant in equity, provided it be fair and reasonable. *Cannell v. Buckle, 1 P. Wms. 242. Ed. Cox, Darnford v. Lane, Bro. 106. Williams v. Williams, lb. 152.* with the cases there cited.

that

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that shall be sufficient evidence of a promise on her part.
Read, Tit. Marriage.

But if the one only promiseth, and the other doth not, either expressly, or by implication: this is a contract that walks upon one leg, and consequently not of any force.
Ayl. Parerg. 246.

Contract must
be in writing.

[By the stat. of frauds (29 Car. 2. c. 3. § 4.) no action shall be brought to charge any person upon any agreement upon consideration of marriage, unless the agreement upon which such action shall be brought, or some *memorandum* or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.]

III. Of banns.

Banns, what. 1. *Banns* is a Saxon word, and signifieth a proclamation.

Previous notice. 2. No minister shall be obliged to publish the banns of matrimony between any persons whatsoever, unless they shall seven days at the least before the time required for the first publication, deliver or cause to be delivered to him a notice in writing of their true christian and surnames, and of the houses of their respective abodes within such parish chapelry or extraparochial place where the banns are to be published, and of the time during which they have inhabited or lodged in such houses respectively.
26 G. 2. c. 33. f. 2.

Where. 3. And all banns of matrimony shall be published in the parish church, or in some publick chapel wherein banns of matrimony have been usually published, of the parish or chapelry wherein the persons to be married shall dwell.
26 G. 2. c. 33. f. 1.

And where the persons to be married shall dwell in divers parishes or chapelries, the banns shall be published in the church or chapel belonging to such parish or chapelry wherein each of the said persons shall dwell. *Id.*

And where both or either of the persons to be married shall dwell in any extraparochial place (having no church or chapel wherein banns have been usually published), then the banns shall be published in the parish church or chapel belonging to some parish or chapelry adjoining to such extraparochial place. *Id.*

Note,

Note, that all parishes where there shall be no parish church or chapel belonging thereto, or none wherein divine service shall be usually celebrated every Sunday, may be deemed extraparochial places for the purposes of this act, but for no other purpose. s. 5.

Provided, that after the solemnization of any marriage under a publication of banns, it shall not be necessary in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes or chapels wherein the banns of matrimony were published; nor shall any evidence in such case be received to prove the contrary, in any suit, touching the validity of such marriage. s. 10.

4. And the said banns shall be published upon three ^{When.} Sundays preceding the solemnization of marriage, during the time of morning service, or of the evening service if there be no morning service in such church or chapel on any of those Sundays, immediately after the second lesson. 26 G. 2. c. 33. s. 1.

5. *Rubric.* Whilst the marriage is contracting, the ^{Proclamation.} ministers shall inquire of the people by three public banns, concerning the freedom of the parties from all lawful impediments. And if any minister shall do otherwise, he shall be suspended for three years. *Lind.* 271.

Rubr. And the curate shall say after the accustomed manner: "I publish the banns of marriage between M. of ——— and N. of ——— If any of you know
" cause or just impediment why these two persons should
" not be joined together in holy matrimony, ye are to
" declare it. This is the first (second, or third) time
" of asking."

6. And in case the parents or guardians or one of them, <sup>Dissent of pa-
rents or guar-
dians.</sup> of either of the parties who shall be under the age of twenty-one years, shall openly and publicly declare or cause to be declared in the church or chapel where the banns shall be so published, at the time of such publication, his dissent to such marriage; such publication of banns shall be void. 26 G. 2. c. 33. s. 3.

7. *Rubr.* And where the parties dwell in divers parishes, ^{Certificate.} the curate of the one parish shall not solemnize matrimony betwixt them, without a certificate of the banns being thrice asked, from the curate of the other parish.

And by the 26 Geo. 2. c. 33. Where the banns shall be published in any church or chapel belonging to any parish adjoining to any extraparochial place as aforesaid, the minister publishing such banns shall in writing under his hand

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hand certify the publication thereof, in such manner as if either of the parties to be married dwelt in such adjoining parish. s. 1.

The form of which certificate may be to this effect :

“ I do hereby certify, that the banns of marriage between
 “ A. B. of the parish of Orton in the county of West-
 “ morland, and C. D. of the parish of Ravenstondale in
 “ the county aforesaid, have been duly published in the
 “ parish church of Orton aforesaid, on three several sun-
 “ days, to wit, Oct. 27. Nov. 3. and Nov. 10. now last
 “ past; and that no cause or just impediment hath been
 “ declared, why they may not be joined together in holy
 “ matrimony. Witness my hand, Nov. 13. 1762.

Ri. Burn,

Vicar of Orton aforesaid.”

IV. Of licence.

Who may grant. I. Some have questioned the bishop's power to grant licences for marrying without banns first published; because this is dispensing with an act of parliament: for the marriage office, which requires banns, is part of the statute law. But this power of dispensing is granted to the bishop by statute law too, viz. by the 25 H. 8. c. 21. by which all bishops are allowed to dispense as they were wont to do; and such dispensations have been granted by bishops, ever since archbishop *Mepham's* time at least. *Johns.* 194.

By *Can.* 101. No faculty or licence shall be granted for solemnization of matrimony without publication of banns, by any person exercising any ecclesiastical jurisdiction or claiming any privileges in the right of their churches; but only by such as have episcopal authority, or the commissary for faculties, vicars general of the archbishops and bishops *sede plena* or *sede vacante*, the guardian of the spiritualties, or ordinaries exercising of right episcopal jurisdiction in the several jurisdictions respectively.

And by the 26 G. 2. c. 33. No surrogate deputed by any ecclesiastical judge, who hath power to grant licences of marriage, shall grant any such licence before he hath taken an oath before the said judge, faithfully to execute his office according to law, to the best of his knowledge, and hath given security by his bond in the sum of 100 l.

to the bishop of the diocese, for the due and faithful execution of the said office. *f. 7.*

2. And no licence shall be granted, but unto such persons only, as be of good state and quality. *Can. 101.*

3. And no licence shall be granted, but upon good caution and security taken. *Can. 101.*

Which security shall contain these conditions: 1. That at the time of granting such licence, there is not any impediment of precontract, consanguinity, affinity, or other lawful cause, to hinder the said marriage. 2. That there is not any controversy or suit depending in any court, before any ecclesiastical judge, touching any contract or marriage of either of the said parties with any other. 3. That they have obtained thereunto the express consent of their parents (if they be living), or otherwise of their guardians or governors. Lastly, that they shall celebrate the said matrimony publickly in the parish church or chapel where one of them dwelleth, and in no other place, and that between the hours of eight and twelve in the forenoon. *Can. 102.*

And for the avoiding of all fraud and collusion in the obtaining of such licences and dispensations; before such licence shall be granted, it shall appear to the judge by the oaths of two sufficient witnesses, one of them to be known either to the judge himself, or to some other person of good reputation then present, and known likewise to the said judge, that the express consent of the parents, or parent, (if one of them be dead,) or guardians or guardian of the parties, is thereunto had and obtained: and furthermore, that one of the parties shall personally swear, that he believeth that there is no let or impediment of precontract, kindred, or alliance, or of any other lawful cause whatsoever, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony, according to the tenor of the aforesaid licence. *Can. 103.*

But if both the parties which are to marry, being in widowhood, do seek a faculty for the forbearing of banns; then the clauses before mentioned, requiring the parents consents, may be omitted: but the parishes where they dwell, both shall be expressed in the licence, as also the parish named where the marriage shall be celebrated. And if any commissary for faculties, vicars general, or other the said ordinaries shall offend in the premises or any part thereof; he shall for every time so offending be suspended from the execution of his office for the space of six months;

and

and every such licence or dispensation shall be held void to all effects and purposes, as if there had never been any such granted; and the parties marrying by virtue thereof, shall be subject to the punishments which are appointed for clandestine marriages. *Can. 104.*

Which clause declaring the licence void to all effects and purposes as if there had never been any such granted, seemeth to render it a matter of great importance that the aforesaid prerequisites be strictly observed; for altho' before the statute of 26 G. 2. only the licence in such case was void, and the parties marrying by virtue thereof were liable to be punished as for a clandestine marriage, yet now by the said statute the marriage also will be void, and the other consequences of clandestine marriages will ensue.

Stamp.

4. By the 5 W. c. 21. For every skin or piece of vellum or parchment, or sheet or piece of paper, upon which any licence for marriage shall be ingrossed or written, shall be paid a stamp duty of 5s. s. 3. (2)

Licence where
no 100.

5. No licence of marriage shall be granted by any archbishop, bishop, or other ordinary or person having authority to grant the same, to solemnize any marriage in any other church or chapel, than in the parish church or publick chapel of the parish or chapelry, within which the usual place of abode of one of the persons to be married shall have been for the space of four weeks immediately before the granting such licence; or where both or either of the parties shall dwell in an extraparochial place having no church or chapel wherein banns have been usually published, then in the parish church or chapel belonging to some parish or chapelry adjoining to such extraparochial place; and in no other place whatsoever. 26 G. 2. c. 33. s. 4.

Provided, that where the marriage is by licence, it shall not be necessary, in support of such marriage, to give any proof that the usual place of abode of one of the parties for the space of four weeks as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in such case be received to prove the contrary, in any suit touching the validity of such marriage. s. 10. —That is to say, this shall not avail so as to render the marriage null and void: but nevertheless, the surrogate who granteth such licence contrary to the tenor of this act, seemeth to incur the violation of his oath, and

(2) By subsequent stamp acts, in the whole 15s.

forfeiture

forfeiture of his bond given to the spiritual judge; and is liable to be otherwise punished for his contempt of the law.

Also this shall not extend to deprive the archbishop of Canterbury, and his proper officers, of the right which hath hitherto been used, in virtue of the statute of the 25 H. 8. c. 21. of granting special licences to marry at any convenient time or place. f. 6.

By which statute of the 25 H. 8. power is given to the archbishop of Canterbury, to grant faculties, dispensations, and licences; as the pope had done before. And by the same statutes it is enacted, that all children procreated after solemnization of any marriages to be had by virtue of a licence or dispensation from the archbishop of Canterbury, shall be admitted reputed and taken legitimate in all courts and other places, and inherit the inheritance of their parents and ancestors.

6. If any person shall falsly make, alter, forge, or Forging licence; counterfeit any such licence of marriage; or cause or procure the same to be done; or assist therein; or utter or publish the same as true, knowing the same to be false, altered, forged, or counterfeited; he shall be guilty of felony without benefit of clergy. 26 G. 2. c. 33. f. 16.

V. *When and where to be solemnized; and therein of clandestine marriages.*

1. In all cases where banns shall have been published, When and the marriage shall be solemnized in one of the parish where, churches or chapels where such banns have been published, and in no other place. 26 G. 2. c. 33. f. 1.

And no licence marriage shall be solemnized in any other church or chapel, than where the usual place of abode of one of the parties hath been for the space of four weeks next before the granting of such licence. f. 4.

And by Can. 63. Every minister who shall celebrate marriage between any persons contrary to the canons aforesaid, or any part thereof, under colour of any peculiar liberty or privilege claimed to appertain to certain churches and chapels, shall be suspended for three years, by the ordinary of the place where the offence shall be committed; and if any such minister shall afterwards remove from the place where he hath committed the fault, before he be suspended; then shall the bishop of the diocese, or ordinary of the place where he remaineth, upon

certificate under the hand and seal of the other ordinary from whose jurisdiction he removed, execute that censure upon him.

By a constitution of archbishop *Reynolds*: Matrimony shall be solemnized reverently, and *in the face of the church*. Lind. 271.

And by the words in the beginning of the office of matrimony, it is supposed to be done *in the presence of the congregation*.

And in the case of marriage by licence, it is required by *Can. 62.* that the same shall be solemnized *between the hours of eight and twelve in the forenoon*: And *in time of divine service*.

Ecclesiastical
punishment of
clandestine mar-
riages.

2. Stratford. *Persons contracting matrimony, and causing the same to be solemnized, knowing any canonical impediments in that behalf, or having strong presumption thereof; shall ipso facto incur the sentence of the greater excommunication.* Lind. 277.

Mepham. Every priest who shall presume to celebrate matrimony any where save in the parish church [where one of the parties or their friends do inhabit; *Johns.*] without the special licence of the diocesan; or who shall be present thereat; shall be suspended from his office for a whole year. Lind. 274.

Stratford. *The foregoing constitution shall be extended to chapels, having of old time had parochial rights, and the priest shall incur the said pain ipso facto.* Lind. 277.

Of old time] That is for forty years at least. *Id.*

Stratford]. *Priests, who shall knowingly make solemnization of marriages prohibited, or of lawful matrimony between others than their own parishioners, without the licence of the diocesans, or of the proper curates of the persons contracting; also they who shall cause by force or fear clandestine marriages to be solemnized in churches oratories or chapels, or shall be present thereat, knowing the same; shall incur the sentence of the greater excommunication, and be otherwise punished as the law directs.* Lind. 276.

Between others than their own parishioners] That is, where neither of the parties is of their own parish. *Id.*

Without the licence of the diocesans] Who having cure throughout the whole diocese, have power to grant licences in all places within their diocese. *Id.*

Or of the proper curates] That is, as to their own parishioners only. *Id.*

Or shall be present thereat] And such person would not be admitted in the spiritual court to prove such marriage, until

until he should be legally absolved from the sentence incurred thereby.

Canon 62. *No minister, upon pain of suspension for three years ipso facto, shall celebrate matrimony between any persons, without a faculty or licence, or without banns published; neither shall any minister, upon the like pain, under any pretence whatsoever, join any persons so licensed in marriage at any unreasonable times, but only between the hours of eight and twelve in the forenoon, nor in any private place, but either in the churches or chapels where one of them dwelleth, and likewise in time of divine service; nor when banns are thrice asked (and no licence in that respect necessary) before the parents or governors of the parties to be married, being under the age of twenty and one years, shall either personally, or by sufficient testimony, signify to him their consent given to the said marriage.*

Upon pain of suspension] In our ecclesiastical records, we frequently meet with absolutions of clergymen who had celebrated marriages clandestinely; and so late as archbishop *Saucroft's* time, we find the intire process of such an absolution: but in the more ancient registers, towards the beginning of the reformation, one and the same dispensation issued, for the minister and the two parties; which sort (as well as separate dispensations) are very common in our books. *Gibf. 425.*

Without a faculty or licence] Such faculties have been very various, in point of extent; in many instances requiring a publication, sometimes once, and dispensing with two; in other cases twice, and dispensing but with one; and again in other cases expressly requiring all the three publications, and dispensing only with time or place. Instances of all which, especially before the reformation, are very common in our ecclesiastical records. *Gibf. 425.*

At any unreasonable times] That is, of the day, not of the year; concerning which latter head, there seem to be no prohibitions expressed, or plainly supposed, in our constitutions or canons. But there is a place in *Lindwood*, which not only implies a prohibition of times in general, but expressly mentions the times prohibited. Which is, that the solemnization of marriage cannot be from the first sunday in advent, until the octaves of epiphany exclusive; and from septuagesima sunday to the first sunday after easter inclusive; and from the first rogation day, until the seventh day after pentecost inclusive: although marriage may be contracted within these times. *Gibf. 430. Lind. 274. Ayl. Par. 364.*

It is also certain, that a distinction of times hath been observed, as the law of our reformed church; not only from the clause which we may observe in several licences in our books, *quocunque anni tempore*; but also from a remarkable dispute which happened in archbishop *Parier's* time, between the master of the faculties and the vicar general, whether the first only, or the second in conjunction with him, had a right to grant licences on that particular head. *Gibf. 430.*

And after that, in archbishop Whitgift's table of fees, there is first a fee for a licence to solemnize matrimony *without banns*, and afterwards a fee for a licence to solemnize matrimony *in the time of prohibition of banns to be published.*

Which point is further confirmed, by the attempts that have been made in parliament and convocation, to take away that distinction of times: In parliament, in the 17th of Elizabeth, a bill was depending, intitled, an act declaring marriages lawful at all times: and in convocation, in the year 1575, the last of the articles presented to the Queen for confirmation (but by her rejected) was, that the bishops shall take order, that it be published and declared in every parish church within their diocese, before the first day of May next coming, that marriage may be solemnized at all times of the year. Which goes further than what had been projected upon that head in the year 1562, when the scheme intended to be offered to the parliament or convocation, or both, was, that it shall be lawful to marry at any time of the year without dispensation; except it be upon christmas day, easter day and six days going before, and upon whitfunday. *Gibf. 430.*

But these distinctions, being invented only at first as a fund (among many others) for dispensations, and being built upon no rational foundation, nor upon any law of the church of England, have vanished of themselves; and it may be justly questioned, whether if a minister shall refuse to marry any persons within the times pretended to be prohibited, an action upon the case would not lie against him for such refusal; for supposing that heretofore any popish canons, importing such prohibition, were received in this kingdom; yet now they can be of no force, as being contrary to the common law, which for the benefit of the subject, and in favour of the natural rights of mankind, and for the public emolument, alloweth matrimony at all times of the year without restraint.

Bispe

Before the parents or governors shall signify their consents] But by the 26 G. 2. c. 33. no minister solemnizing marriages between persons, both or one of whom shall be under the age of twenty-one years, after banns published, shall be punishable by ecclesiastical censures for solemnizing such marriages without consent of parents or guardians whose consent is required by law, unless he shall have notice of the dissent of such parents or guardians.

§. 3.

3. By the 6 & 7 W. c. 6. *No person shall be married at any place pretending to be exempt from the visitation of the bishop of the diocese, without a licence, except the banns shall be published and certified according to law; and every parson, vicar, and curate, who shall marry any persons contrary to the true intent hereof, shall forfeit 100 l., half to the king, and half to him that will sue in any of his majesty's courts of record; and for the second offence, shall be suspended from his office and benefice for three years.* §. 52.

Pecuniary forfeiture.

And by the 7 & 8 W. c. 35. *Every parson, vicar, or curate who shall marry any persons in any church or chapel, exempt or not exempt, or in any other place whatever, without publication of banns, or without licence, shall forfeit 100 l.* §. 2.

And every parson, vicar, or curate who shall substitute or employ, or knowingly and wittingly shall suffer and permit, any other minister to marry any persons in any church or chapel to such parson vicar or curate belonging or appertaining, without publication of banns or licence, shall forfeit 100 l. §. 3.

The said forfeitures to be half to the king, and half to him that shall sue. §. 3.

And every man so married without licence or publication of banns as aforesaid, shall forfeit 10 l., to be recovered with costs in manner as aforesaid, by him who shall sue: and every sexton or parish clerk, or other person acting as sexton or parish clerk, who shall knowingly and wittingly aid promote and assist at such marriages so celebrated without banns or licence as aforesaid, shall forfeit 5 l. to be recovered with costs of suit in manner as aforesaid, by him who shall sue. §. 4.

And by the 10 Ann. c. 19. *Whereas great loss hath happened of the duties upon stamped vellum parchment and paper, and other inconveniencies daily grow from clandestine marriages; it is enacted, that every parson vicar or curate, or other person in holy orders, beneficed or not beneficed, who shall marry any person in any church or chapel, exempt or not exempt, or in any other place whatsoever, without publication of banns, or without licence from the proper ordinary, shall forfeit 100 l.,*

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with full costs, half to the queen, and half to him that will sue in any of the courts of record at Westminster; and if such offender shall be a prisoner in any prison or gaol (other than a county gaol) at the time of such offence committed, and shall be duly convicted thereof, then upon oath made of such imprisonment before one of the judges, and upon producing a copy of the record of such conviction to be likewise proved upon oath before the said judge, he shall grant his warrant to the keeper of the gaol or prison where such offender is a prisoner, to remove him to the gaol of that county where he is a prisoner, there to remain charged in execution with the penalty inflicted by this act, and with all and every the causes of his former imprisonment: And if any gaoler or keeper of any prison, shall be privy to, or knowingly permit any marriage to be solemnized in the said prison, before publication of banns or licence as aforesaid, he shall forfeit 100 l. to be recovered and distributed as aforesaid, s. 176.

Saving nevertheless, to all archbishops, bishops, archdeacons and other ordinaries, their vicars-general commissaries and officials, the free exercise of all ecclesiastical jurisdiction, and full power and authority of inflicting all such pains and censures for this or any other crime or crimes, as they might have done if this act had not been made. s. 177.

And provided, that the said provision for marriages do not extend to that part of Great Britain called Scotland. s. 178.

Upon the aforesaid statute of the 7 & 8 W. c. 35. s. 4. in the case of *Middleton* and his wife against *Croft*, M. 10 G. 2. In prohibition: The plaintiff declared, that by the said statute a penalty of 10 l. is inflicted on every man who marries without licence or banns, notwithstanding which, he and his wife had been cited into the spiritual court, for being married *before eight in the morning, without licence or banns*, contrary to the canon, which fixes the time to be between eight and twelve, and requires a licence or banns; that they are lay persons, not bound by the canon, and therefore pray a prohibition. The defendant, as to the contempt, pleads not guilty; and for a consultation, demurs. And after several arguments at the bar, lord *Hardwicke* chief justice this term delivered the resolution of the court:—In this case three questions have been made: 1. Whether by the canons of 1603, lay persons are punishable for a clandestine marriage. 2. If not, whether by the canon law anciently received, the spiritual court hath a jurisdiction to proceed for a clandestine marriage. And 3. Supposing they have a jurisdiction either way, whether that jurisdiction is taken away by the act of parliament, which

which hath inflicted a penalty of 10 l. As to the first: two things are considerable; first, whether the laity are within the words of those canons as to this matter; secondly, whether there was a proper authority to bind the laity, if the words do extend to them. And as to the question, whether the words take them in; those which any way relate to this matter are the canons 62, 101, 102, 103, and 104. In the four first of which, there are no words that effect the parties contracting: indeed in the 104th there are words relating to the married persons, but they relate only to marriages under void or irregular licences, which is not this case: and therefore upon this point we are all of opinion, that lay persons are not within the words of the canons of 1603. The next point is, whether the makers of those canons had a power to bind the laity: and we are all of opinion, that *proprio vigore* the canons of 1603 do not bind the laity; I say, *proprio vigore*, because some of them are only declaratory of the ancient canon law. The second point to be considered is, whether laying aside the canons of 1603, the spiritual court hath any jurisdiction under the former canon law received and allowed, to proceed against the plaintiffs for a clandestine marriage: and we are all of opinion, that in this respect their jurisdiction is well founded. And as to the third point, whether the statute of the 7 & 8 W. hath by inflicting that penalty taken away the jurisdiction of the spiritual court; it is to be observed, that as to the woman, she indisputably remains subject to the ecclesiastical jurisdiction, for the penalty is only upon the man; but as to the man likewise, we are all of opinion, that the ecclesiastical jurisdiction is not taken away by the statute, but that both the jurisdictions do well stand together. And upon the whole we are of opinion, that there ought to go a consultation as to all the points of the suit below but one, which is, the hour at which the marriage is alledged to have been had. Now as the confining marriages to be between eight and twelve in the morning, is only a regulation introduced by the canons of 1603, which we have determined do not bind in this case; it is of consequence, that the spiritual court be restrained from making that any ground of their proceedings. In this respect therefore, the prohibition must stand, and a consultation must go for the rest. *Str.* 1056. 2 *Atkyns.* 650. (x).

(x) *S. C.* 4 *Vin. Ab. Tit. Canons*, 14. 2 *Barn. B. R.* 351. 2 *Atk.* 650.

Felony.

4. By the 26 G. 2. c. 33. If any person shall solemnize matrimony in any other place than a church or publick chapel where banns have been usually published, unless by special licence from the archbishop of Canterbury; or shall solemnize matrimony without publication of banns, unless licence be first had from some person having authority to grant the same; every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be adjudged guilty of felony, and transported for fourteen years. s. 8 (Except in Scotland, and except the marriages of quakers or jews as aforesaid. s. 18.)

Marriage to be void,

The prosecution for such felony to be commenced within three years after the offence committed. s. 9.

5. *T. 9 An. Haydon and Gould.* Before the delegates, It appeared that Haydon and Rebecca his wife were sabbatarians, and were married by one of their ministers in a sabbatarian congregation: the form in the common prayer book was used, except the ceremony of the ring. They lived together as man and wife for seven years, and then Rebecca died. Whereupon Haydon took out letters of administration to her. But Gould and Margaret his wife, who was sister to Rebecca, sued a repeal, suggesting that Rebecca and Haydon were never married. And it appearing that the minister who married them was a mere layman, and not in orders, the letters of administration which had been granted to Haydon as her husband were repealed, and a new administration granted to the said Margaret Gould her sister. And this sentence, upon an appeal, was affirmed by the court of delegates. For it was held, that as Haydon demanded a right to himself as husband by the ecclesiastical law, he ought to prove himself a husband by that law: and so the court ruled. And a case was cited out of Swinburn, where such a marriage had been ruled to be void, as to the privileges attending legal marriages. And it is observed in that case, that an act of parliament was thought necessary after the grand rebellion, to entitle people who had been married by justices of the peace, to such legal advantages of dower thirds, and the like, as attended marriages duly solemnized according to the rites of the church of England; and the act of the 7 & 8 W. c. 35. seems to put this matter out of all doubt, which lays a penalty on clergymen in orders, if they celebrate marriage in a clandestine manner; for if the same privileges and advantages attended marriages solemnized by the dissenters as those celebrated according to the church of England, how easily would that

be evaded or rather rendered of no effect. There would then be no occasion for licence or banns; for making oath; or giving security that there were no legal impediments: but every one might do what was right in his own eyes, who should get himself admitted of a dissenting congregation. *Read. Tit. Marriage. 1 Salk. 119.*

But marriages by Romish priests, whose orders are acknowledged by the church of England, have been deemed to have the effects of a legal marriage, at least in some instances; as in the case of Mr. *Filding*, who was married by a Romish priest to Mrs. *Wadsworth*: This was held to be such a marriage, as to make it felony in him to marry afterwards to the duchess of *Cleveland*. *Read. Tit. Mar.*

And in *Wigmore's* case, *M. 5 Ann.* where the wife sued in the spiritual court for alimony, and in fact the husband was an anabaptist, and although he had a licence from the bishop to marry, yet he married this woman according to the forms of their own religion; Holt chief justice, upon the prohibition, said, By the canon law, a contract *per verba de presenti* is a marriage, so is a contract *per verba de futuro* if the contract be executed and he does take her; this is a marriage, and they cannot punish for fornication, but only for not solemnizing the marriage according to the forms prescribed by law, but not so as to declare the marriage void. *2 Salk. 438.*

But now by the 26 G. 2. c. 33. If any person shall solemnize matrimony (*except in Scotland, and except quakers and jews as aforesaid*) in any other place than in a church or public chapel *where banns have been usually published*, unless by special licence from the archbishop of Canterbury; or shall solemnize the same without lawful banns or licence: such marriage shall be null and void to all intents and purposes whatsoever. s. 8.

Except in Scotland] The passage into Scotland being left open by this act, many persons have found their way thither to be married, in a manner very clandestine and irregular. And there hath been diversity of opinions concerning the validity of such marriages.

Lord *Stair*, in his Institutions of the Law of Scotland, page 26, says, "The public solemnity of marriage, is a matter of order, justly introduced by positive law, for the certainty of so important a contract; but not essential to marriage. Thence arises the distinction, of public or solemn, and private or clandestine marriages. And although persons who act contrary thereto may be justly punished

punished (as in some nations by exclusion of the issue of such marriages from succession), yet the marriage cannot be declared void and annulled; and such exclusions seem very unequal against the innocent children. But by the custom of Scotland, cohabitation, and being commonly reputed man and wife, validates the marriage, gives the wife right to her thirds, who cannot be excluded therefrom, if she was reputed lawful wife, and not questioned during the husband's life, till the contrary be clearly proved."

Mr. *Erskine*, in his *Principles of the Law of Scotland*, pages 62 and 64, says, "It is not necessary that marriage be celebrated by a clergyman. The consent of parties may be declared before any magistrate, or simply before witnesses. When the order of the church is observed, the marriage is called regular; when otherwise, clandestine. Towards a regular marriage, the church requires proclamation of banns in the churches where the bride and bridegroom reside. Formerly, not only bishops, but presbyteries, assumed a power of dispensing with proclamation of banns on extraordinary occasions: but this hath not been exercised since the revolution."

In *M'Donall's Institute of the Law of Scotland*, Vol. 1. p. 112, he says, "Marriage is perfected by sole consent; for carnal knowledge is only the consummation of it. Marriage is either solemn, or clandestine. A solemn marriage is that which is celebrated by a minister of the established church, or one having the benefit of the toleration act, after due proclamation of banns. This ought regularly to be done three several Sundays, in the churches respectively where the parties frequent divine service; but if they belong to an episcopal meeting, it must be done in their congregation, and likewise in the parish churches where the parties reside; and in case the minister of such parish shall neglect or refuse to publish the banns, it is declared sufficient if done in the episcopal congregation alone. But the public solemnity is only a matter of order, and not essential to marriage; and therefore by the law of Scotland, not only a marriage solemnized by any minister or priest is good, but likewise cohabitation as man and wife, sufficiently ascertains the marriage, not called in question during their joint lives. Those marriages which are not solemnized according to the order of the church, are termed clandestine. Notwithstanding that clandestine marriages are equally binding with solemn ones, certain penalties are imposed upon the

the parties, who thereby act contrary to the order of law; these are imprisonment for three months and a penalty upon the parties, with perpetual banishment or other arbitrary punishment upon the person that solemnizes the marriage. Of old, the parties lost their respective interests of *jus mariti* and *jus relicte*; but that afterwards was altered. Persons residing in Scotland, who marry in England or Ireland, without proclamation of banns in due course, are subject to the pains of clandestine marriages. And the witnesses to an irregular marriage are subject to a fine."

But whether clandestine marriages in Scotland, of English parties, who resort thither to evade the English law, shall be sustained in England, hath been doubted. And very learned men have questioned, notwithstanding that such marriages are valid by the law of Scotland, whether they are effective in England. Where parties are bound, by the laws of their own country, to execute any important act or contract with certain solemnities; it is doubted whether they can elude their own law, by going purposely to another country where such solemnities are not essential, and then returning immediately when the act is done. It is a question of public law; and the most celebrated writers on public law have holden, that such an act is fraudulent; it is *fraudem facere lege*, which the laws of all nations disallow. In the case of *Robinson and Bland*, M. 1 G. 3. which was upon a security given in France for money there lost at play, wherein the locality of the transaction came in question, there is an *obiter* observation of lord Mansfield, very remarkable. "As to the money won at play, By the rule of the law of England, no action can be maintained for it. To this it has been objected, that the contract was made in France: therefore the law of France must prevail, and be the rule of determination; by which law, it is alledged, that the money is there recoverable before the marshals of France, who can enforce obedience to their sentences by imprisonment. I admit that there are many cases, where the law of the place of the transaction shall be the rule: and the law of England is as liberal, in this respect, as other laws are. It has been laid down at the bar, that a *marriage* in a foreign country must be governed by the law of that country where the marriage was had. Which, in general, is true. But the marriages in Scotland, of persons going from hence for that purpose, were instanced by way of example. They may come under a very different consideration; according

according to the opinion of HADAMUS, p. 33. and other writers (y). No such case hath yet been imagined in England, except one, of a marriage at Oxford; which came before lord Hardwicke; who ordered it to be tried in the ecclesiastical court: but the young man came of age, and the parties were married over again; and so the matter was never brought to a trial." *Bar. Mansf.* 1079.

But in *Buller's Law of Nis Prius*, p. 113. there is a short note of a case wherein this point was afterwards determined, upon an appeal to the delegates; viz. "*Cumpton and Biercroft*, 1 Dec. 1768. The appellant and respondent, both English subjects, and the appellant being under age, ran away without the consent of her guardian, and were married in Scotland; and on a suit brought in the spiritual court to annul the marriage, it was holden that the marriage was good."

Where banns have been usually published] *E. 21 G. 3. K. and Northfield.* Two justices of the peace had made an order to remove *Abigail Jones*, widow of *Joseph Jones*, from the parish of *King's Norton* to the parish of *Northfield*, which last parish appealed to the quarter sessions; and they confirmed the original order, and stated specially: That the pauper *Abigail Jones* being, whilst sole, a settled inhabitant at *King's Norton* in the year 1775, intermarried with *Joseph Jones* a settled inhabitant at *Northfield*, at *Burley-bil.* chapel, in the parish of *King'swinford* in the county of *Stafford*, which was erected in the year 1765, and then duly consecrated, and in which divine service had been publicly and regularly celebrated ever since; and wherein banns of marriage had been often published, and marriages celebrated, previous to the marriage in question: that the said chapel was a new one, erected since the

(y) Sæpe fit ut adolescentes sub curatoribus agentes, furtivos amores nuptiis conglutinare cupientes, abeant in Frisiam orientalem aliave loca, in quibus curatorum consensus ad matrimonium non requiritur juxta leges Romanas quæ apud nos hac parte cessant. Celebrant ibi matrimonium et mox redeunt in patriam. Ego ita existimo hanc rem manifesto pertinere ad eversionem juris nostri; ac ideo non esse magistratos heic obligatos, e jure gentium ejusmodi nuptias agnoscere et ratas habere: multoque magis statuendum est, eos contra jus gentium facere videri, qui civibus alieni imperii suâ facilitate jus patriis legibus contrarium scientes volentes impertiuntur. *Huber. ad Pand. L. 1. T. 3. De conflictu legum. § 8.*

marriage act, and not erected on the foundation of one that was ancient; and no act of parliament was obtained for erecting the said chapel, or for celebrating marriages there. The two orders being removed by certiorari into the king's-bench, the only question appeared to be, whether the marriage, upon the facts stated relative to the chapel, was void by the provisions of the said act. On its being moved for a rule to shew cause why these orders should not be quashed, lord *Mansfield* seemed to discourage the attempt to try a question of such serious consequence, in a collateral way, on a settlement case; and said, he would turn the parish complaining of the removal, round, if he could. On shewing cause, the counsel in support of the orders admitted, that when the validity of a marriage under the marriage act becomes a question in the case of a settlement, it is not necessary that there should have been a sentence of the spiritual court in order to entitle the parties interested to shew the nullity of such marriage; but they contended, that the words *usually published* ought to be construed to mean usually at the time when the marriage in question took place. If so, there was enough stated in the case, for the court to consider this as a chapel in which banns had been usually published. The word *often* is nearly tantamount to *usually*; but, if it were not, yet as it is a rule that an order of sessions is always to be supported, unless something appears expressly on the face of it which shews it to be against law, the court would intend this to be such a chapel as the act required. If the construction contended for on the other side should prevail, this act would prove a trap to clergymen and innocent persons, who could not be expected to search into history, to discover the exact time when marriages first began to be celebrated in any particular chapel. It is hard perhaps to draw a line, but here a usage is clearly established long before this marriage took place.— On the other hand, against the validity of the marriage, it was argued, that the act is to be construed, as if the case had happened the day after it passed. Usage *since* could not vary the case; for to give operation to usage, it must have a legal commencement. Arguments of hardship and inconvenience can only be resorted to when the law is doubtful, but here the words of the statute are clear. This is no more a trap than any other prohibitory law. After the passing of the act, no marriages have been attempted to be celebrated in Lincoln's-Inn chapel, Gray's-Inn chapel, and many others, altho' they are old chapels, because
banns

banns had not been usually published in them; and it would be absurd, if a chapel erected since the act should be in a better situation in that respect, than those which had existed long before.—Lord *Mansfield*: For a long time I was much averse to a determination of this point, in such a question, and between such parties. But upon more consideration, I think we ought now to decide it: If there has been an abuse, we ought to stop it as early as possible. A delay might lead to a supposition that we doubt, where in truth we do not; and any subsequent inconvenience, in consequence of our supposed doubt, might be chargeable upon us. The act clearly meant chapels existing at the time. It says, the banns shall be published in the parish church, or in some public chapel belonging to such parish or chapelry, wherein the parties to be married shall dwell. There is no chapelry here. I am of opinion, that this marriage was void by the provisions of the statute. *Douglas*, 634.

Soon after this determination, a bill was brought into parliament, and passed into a law, reciting, that whereas since passing the act of 26 G. 2. divers churches and public chapels have been erected and consecrated, and marriages solemnized therein, but by reason that in such churches and chapels banns of matrimony had not been usually published before or at the time of passing the said act, such marriages have been deemed to be void; therefore enacts, That all marriages solemnized or to be solemnized before Aug. 1. 1781, in any church or public chapel erected and consecrated since the making of the said act, shall be as good and valid in law, as if they had been solemnized in parish churches or public chapels having chapelries annexed, and wherein banns had been usually published before or at the time of passing the said act; and clergymen having solemnized the same shall be indemnified; and the registers that have been made of such marriages shall be removed to the parish church, and there kept as the registers of such parish. 21 G. 3. c. 53.

[Note, this act relates only to marriages celebrated in churches or public chapels erected *since* the said marriage act of 26 G. 2. Such as had been erected a *longer* or shorter time *before*, are not provided for by this remedial law. As to these, the matter is still left open; which includes in it this important question, How far the word *usually* shall be understood to extend.]

VI. Form of solemnization.

1. By the statute of the 26 G. 2. c. 33. All marriages, ^{Witnesses present.} shall be solemnized in the presence of two credible witnesses at the least; besides the minister; who shall sign their attestation thereof. s. 15.

2. And at the time of the celebration of the marriage; ^{Impediments alleged.} the minister reciting the causes for which matrimony was ordained, shall say, "If any man can shew any just cause why they may not lawfully be joined together let him now speak, or else hereafter for ever hold his peace."
Rubr.

And then speaking unto the persons that shall be married, he shall say; "I require and charge you both, as ye will answer at the dreadful day of judgment when the secrets of all hearts shall be disclosed, that if either of you know any impediment, why you may not be lawfully joined together in matrimony, ye do now confess it; for be ye well assured, that so many as are coupled together otherwise than God's word doth allow, are not joined together by God, neither is their matrimony lawful." *Rubr.*

At which day of marriage, if any man do alledge and declare any impediment why they may not be coupled together in matrimony by God's law, or the laws of this realm; and will be bound, and sufficient sureties with him to the parties, or else put in a caution (to the full value of such charges as the persons to be married do thereby sustain) to prove his allegation; then the solemnization must be deferred until such time as the truth be tried. *Rubr.*

3. If no impediment be alledged, then the marriage shall Ring go on; and after the parties have declared their mutual assent, and have taken each other in marriage according to the form prescribed, then the man shall give unto the woman a ring, laying the same upon the book, with the accustomed duty to the priest and clerk. And the priest taking the ring, shall deliver it unto the man to put it on the fourth finger of the woman's left hand; and the man holding the ring there, and taught by the priest, shall say, "With this ring I thee wed, with my body I thee worship, and with all my worldly goods I thee endow."
Rubr.

Which 13 words are best explained by the rubrick of the 2 *Ed. 6.* which was thus: "The man shall give unto the woman a ring, and other tokens of spousage; as gold or silver, laying the same upon the book, and the man taught by the priest shall say, With this ring I thee wed, this gold and silver I thee give;" and then these other words, "with all my worldly goods I thee endow," were delivered with a more peculiar significance.

The ring at first (according to *Suzinburn*) was not of gold but of iron, adorned with an adamant; the metal hard and durable, signifying the durance and perpetuity of the contract. Howbeit he says; it liketh not at this day what metal the ring be of: the form of it being round and without end, doth import, that their love should circulate, and flow continually. The finger on which this ring is to be worn, is the fourth finger of the left hand next unto the little finger, because there was supposed a vein of blood to pass from thence unto the heart. *Suzinb. Matr. Conf.* sect 15.

In the Roman ritual, there is a benediction of the ring and a prayer that she who wears it may continue in perfect love and fidelity to her husband, and in the fear of God all her days.

Sacrament.

4. By the rubricks of the 2 and of the 5 *Ed. 6.* The new married persons were required on the same day of their marriage to receive the holy communion.

But by the present rubrick, it is only declared to be convenient, that the new married persons should receive the holy communion at the time of their marriage, or at the first opportunity afterwards.

Sermon.

5. By the rubricks of the 2 and of the 5 *Ed. 6.* After the gospel was to be a sermon, wherein ordinarily the office of a man and wife should be declared, according to holy scripture; or if there were no sermon, then the minister was to read several sentences out of scripture, setting forth the said duties.

And by the present rubrick, If there be no sermon declaring the duties of man and wife, then the minister shall read the same sentences as aforesaid.

VII. Fee for marriage.

Langton. *We do firmly injoin, that no sacrament of the church shall be denied to any one upon the account of any sum of money,*

money, nor shall matrimony be hindered therefore: because if any thing hath been accustomed to be given by the pious devotion of the faithful, we will that justice be done thereupon to the churches by the ordinary of the place afterwards. Lind. 278.

That no sacrament of the church] Which were seven; of which matrimony was one.

Shall be denied] Or delayed. Lindw. 278.

Upon the account of any sum of money] That is, used to be paid or taken in the administration of any of the sacraments. Lind. 278. (x)

Nor shall matrimony be hindered therefore] But by the rubrick in the office of matrimony, at the time of delivering the ring, the man shall also then lay down the accustomed duty to the priest and clerk. Which if he shall refuse to do; whether the minister is bound to proceed nevertheless, doth not appear from any rubrick or canon.

Hath been accustomed to be given] That is, of old, and for so long time as will create a prescription, altho' at first given voluntarily. For they who have paid so long, are presumed at first to have bound themselves voluntarily thereunto. Lind. 279.

And this, it is said, is recoverable by law, in such places and cases only, where there is a custom for the payment thereof, upon performance of the duty. *Boh. L. of Titb. 144, 5.*

Mr. *Johnson* says, it was an ancient custom, that marriage should be performed in no other church but that to which the woman belonged as a parishioner; and therefore to this day, the ecclesiastical law allows a fee due to the curate of that church, whether she be married there or not. And this fee was expressly reserved for him by the words of the licence, according to the old form, which is not yet disused in all dioceses. But it is said, that judgment hath been otherwise given in the temporal courts. *Johns. 188, 189.*

So in the case of *Thompson and Davenport, M. 13 W.* The plaintiff libelled against the defendant, setting forth a custom in the parish of Ellington in Derbyshire, that of every woman who is a parishioner, and dwelleth there, and marrieth with a licence, the husband at the time of the marriage, or soon after, shall pay to the vicar 5s as

(x) See Deposition, in the note.

an accustomed fee; and so brought his case within that custom; the defendant suggested for a prohibition, that all customs are triable at common law, and that the plaintiff had libelled against him, setting forth the custom as aforesaid. And a prohibition was granted. *Lutw.* 1059.

And in a late case, upon an appeal to the arches, Sir George Lee not only declared against the custom as an unreasonable custom, but gave costs against the clergyman with some warmth.

And Sir William Blackstone says, of common right no fee is due to the minister for performing such like branches of his duty, and it can only be supported by special custom; but no custom can support the demand of a fee without performing them at all. 3 *Black.* 90. (a)

VIII. Register of marriage.

By the 26 G. 2. c. 33. The churchwardens and chapelwardens of every parish or chapelry shall provide proper books of vellum or good and durable paper, in which all marriages and banns of marriage respectively there published or solemnized shall be registered; and every page thereof shall be marked at the top with the figure of the number of every such page, beginning at the second leaf with number one; and every leaf or page so numbered shall be ruled with lines at proper and equal distances from each other, or as near as may be; and all banns and marriages published or celebrated in any church or chapel, or within any such parish or chapelry, shall be respectively entered, registered, printed, or written upon or as near as conveniently may be to such ruled lines, and shall be signed by the parson vicar minister or curate, or by some other person in his presence and by his direction; and such entries shall be made as aforesaid on or near such lines in successive order, where the paper is not damaged by accident or length of time. And all books provided as aforesaid, shall be deemed to belong to such parish or chapelry respectively. s. 14.

And immediately after the celebration of every marriage, an entry thereof shall be made in such register;

(a) 1 *Raym.* 450. 2 *Raym.* 1558. 1 *Barnard. B.R.* 159.
in

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in which entry or register it shall be expressed, that the said marriage was celebrated by banns or licence; and if both or either of the parties married by licence be under age, with consent of the parents or guardians as the case shall be; and shall be signed by the minister with his proper addition, and also by the parties married, and attested by two witnesses present at the solemnization of such marriage. s. 15.

Which entry shall be made in the form or to the effect following, viz.

A. B. of ^{[the} ~~this~~ parish ——— and C. D. of ^{[the} ~~this~~ parish ——— were married in this ^{[church} ~~chapel~~ by ^{[banns} ~~licence~~ with consent of ^{[parents} ~~guardians~~ this ——— day of ——— in the year ———

By me J. J. ^{[Rector} ~~Vicar~~ ~~Curate~~

This marriage was solemnized between us A. B. ^{A. B.} ~~C. D.~~ in the presence of E. F. ^{E. F.} ~~G. H.~~ s. 15.

And if any person shall knowingly and wilfully insert or cause to be inserted in such register book any false entry of any matter or thing relating to any marriage; or falsely make alter forge or counterfeit, or cause or procure to be falsely made altered forged or counterfeited, or assist in falsely making altering forging or counterfeiting, any such entry in such register; or utter or publish as true any such false altered forged or counterfeited register as aforesaid, or a copy thereof, knowing the same to be false altered forged or counterfeited; or if any person shall wilfully destroy or cause or procure to be destroyed, any register book of marriages, or any part thereof, with intent to avoid any marriage, or to subject any person to any of the penalties of this act: he shall be guilty of felony without benefit of clergy. s. 16.

A doubt hath been made, in what manner a marriage celebrated by virtue of a special licence from the archbishop of Canterbury, shall be registered; especially where the marriage is solemnized in a private house, and by a clergyman

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man not being the incumbent of the parish, and the incumbent refuses to permit the same to be entered in the parish register. But the doubt seemeth to be solved by the words of the act itself: The register book of marriages is of the goods of the parish, and consequently the churchwardens (and not the minister) ought to have the keeping thereof; and the act says, all marriages celebrated in any church or chapel, or *within any such parish or chapelry*, shall be entered in such register; and therefore if the churchwardens shall refuse to produce the register book for that purpose, they may be compelled thereunto by legal process: for where a thing by any act of parliament is required to be done; that also is required without which the thing itself cannot be.

Another doubt hath been made, by what *name* the wife shall subscribe the register, whether by the name which she had before marriage, or by the newly acquired name of her husband. In Scotland, the wife retains the name which she had before marriage; but in England the case is otherwise: for by the marriage she loses her former name, and legally receives the name of her husband. As appears from a pretty strong case, *Ben v. Smith, M. 28 El.* a man had issue a son and a daughter, and devised his land to his son in tail; and if he died without issue, that it should remain to the next of his name; and died. The son died without issue; the daughter being then married, the question was, whether she should have this land. And it was held by the court, that she should not. For she had lost her name by her marriage. But it should go to the next heir male of the name. But if she had not been married at the time of her brother's death, she should have had it; for she was the next of the name. *Gro. Eliz. 532.*

IX. Certificate of marriage.

By the 5 *W. c. 21.* For every piece of vellum, parchment, or paper, upon which any certificate of marriage (except of the marriage of a seaman's widow) shall be ingrossed or written, shall be paid a stamp duty of 5s. And if any person shall write such certificate upon the same before it be stamped he shall forfeit 5l.

X. Trial of marriage.

By the ecclesiastical judge.

1. Dr. Godolphin says, that marriage was at first tried in the temporal courts: but afterwards by the concession of
5 of

of princes, such causes were determined in the spiritual courts. *God.* 489.

And the reasons why the cognizance thereof hath been permitted to the ecclesiastical judge, are divers; especially because matrimony was heretofore a sacrament of the church; and the office being performed by clergymen, this of consequence brings the performance under the diocesan's inspection; and in the case of the levitical degrees in particular, ecclesiasticks are presumed to be the best judges of what is prohibited by God's law.

2. The lawfulness of marriage is to be tried by the bishop's certificate, upon an issue *accoupled in lawful matrimony or not*; as in a writ of dower, appeal, bastardy, or the like. *1 Inst.* 134. (b)

As to the lawfulness of marriage.

But whether a woman is a feme covert, or whether she is the wife of such a person, is triable by a jury upon such an issue. Therefore a marriage *de facto*, or in reputation (as amongst the quakers) hath been allowed by the temporal courts to be sufficient to give title to a personal estate, because the lawfulness of the marriage is not in issue, or the point to be tried. For the issue is whether a marriage was contracted between the parties or not, or whether the parties lived in a married estate, where the

(b) And the bishop's certificate in this case is conclusive against all the world, *Fitz. Ab. Esoppel*, 282. *See Bastards*, II. 2. and *Bishops*, IV. 11.; and is the only mode of trying the issue on the plea of *ne unquos accomple in loial matrimonio*, *Co. Entr.* 180. b. 181. for to such a plea a mere sentence in the ecclesiastical court is not a good replication, because that would be to plead evidence, which, if it is any thing, amounts to the general issue, contrary to the rule, *see 4 Bac. Ab.* 60. and to bind the court by what does not bind the bishop, who, if he see cause, may revoke the sentence. *Robins v. Crutchley*, 2 *Wils.* 122, 127. For according to the canonists, *sententia in conjugal causa nunquam transit in rem judicatam*. *Oughton*, f. 306. *Sanchez de Matrimonio*, Lib. 7. *Disp.* 100. quoted by Dr. Wynne in the *Duchess of Kingston's* trial. The reason given is, that secret sin may be avoided: *Potest etiam judex ex officio parte invitâ procedere ad retractandam hujusmodi sententiam, immo ad id teneri judicem probat textus, quia sui interest peccata auferre. Sanchez*. *Ib.* But such a sentence, unreppealed and unappealed from, is evidence to a jury, as will be seen *infra* 6.; and, according to the case of *Meadow v. the Duchess of Kingston*, may be pleaded in chancery. *Ambler*, 756. *Misford*, 294, &c.

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legality of it doth not come in question. *Wood. b. r. c. 6.*

In the act of 6 & 7 W. c. 6. laying a duty upon marriages; quakers and jews, cohabiting as man and wife, were required to pay the said duty, although not married according to the law of England: and there was a proviso, that nothing therein contained should be construed to make good or effectual in law any such marriage or pretended marriage; but that they should be of the same force, and no other, as if the said act had not been made.

But in the act of the 26 G. 2. c. 33. there is no proviso of the like purport: but rather the act proceeds upon a supposition that such marriages are good and valid.

And in the aforesaid case of *Haydon and Gould*, it was said, that though the husband, demanding a right due to him as husband, by the ecclesiastical law, must prove himself a husband according to that law, before he can be intitled to it; and if he do not, shall not reap benefit by his own fault: yet the wife who is the weaker sex, and children who were in no fault, may intitle themselves to a temporal right, by such marriages which (as was urged) cannot be called a mere nullity, because by the law of nature the contract was sufficient; but only an irregularity, in not complying with a positive law. *Gibb. 430.*

Bishop's certificate.

3. In writs of dower or other writs brought in the king's temporal courts, if issue be joined upon *not accoupled in lawful matrimony*, this being a cause which is merely ecclesiastical, the trial thereof must be by the bishop or ordinary, upon an inquisition taken before him as judge. Which is after this manner: The king first sends his writ to the bishop to make the inquiry; for the ecclesiastical judge, before he hath received the king's writ, may not of himself inquire of the lawfulness of the matrimony; but after such time as he hath received the said writ to make the inquiry, he must not surcease for any appeal or inhibition, but must proceed until he hath certified the king's court thereof; and then when the bishop hath received the king's writ, he doth give notice thereof unto the party who took exception to the matrimony at his dwelling house, if he hath any, within the diocese, to speak at a day prefixed by him against the matrimony if he will; and after such notice given, whether the party come or not, the witnesses of the demandant to prove the legality of the matrimony are taken, and admitted by the bishop, if no sufficient

sufficient exception be taken to the witnesses. After the depositions taken, they are published, and certified into the king's court where the issue was joined, by letters under the seal of the bishop, importing that in pursuance of the said writ he hath made due inquiry, according to the ecclesiastical laws, into the matters therein contained; and that he hath found by lawful proofs, and other canonical requisites in that behalf, that such person (as the case shall be) was or was not accoupled in lawful matrimony. For he must certify the point in issue generally, and not make a special verdict of it, or express the manner of the marriage at large. And after such certificate made, there shall be no appeal, but the same certificate shall be a bar and conclude all parties for ever. And after such certificate, and re-summmons of the tenant in the king's temporal court, judgment shall be given for the plaintiff. *Hughes*, 293, 294.

4. In the case of *Harrison and Burwell* (d) before men-
tioned, it was observed, that no prohibition was to be
found in the register or elsewhere, concerning the question-
ing of any marriage in the spiritual court, in all the time
before the acts of parliament, and long after some of them;
and it was also confessed, that neither the act of the 25 H. 8.
nor 28 H. 8. gave any jurisdiction to the temporal courts
concerning marriages, more than they had before; being
acts only directory to the ecclesiastical proceeding in mat-
ters of marriage. But it was declared, that by the 28 H. 8.
the temporal courts are become the proper judges what
marriages are within or without the levitical degrees, and
are to prohibit the spiritual courts if they impeach any per-
sons for marriages without those degrees. But *Vaughan*
declared in this case (and repeated that declaration in the
case of *Hill and Good*) (e), that if granting prohibitions
to the spiritual courts in cases of matrimony, were res integra now, he saw no reason why they should be
granted in any case; but that there having been so many
precedents of prohibitions, and no complaint, or at least
redress, in parliament, they could not take upon them to
alter the course of the law so long practised. *Gibb*. 413.

The latter of these two cases, was in the 25 C. 2; and
in the 34 C. 2. a prohibition was prayed to the spiritual

(d) *Vaugh.* 206. 2 *Vent.* 9.

(e) *Ib.* 220, 304.

court at York, to hinder a prosecution there for marrying the sister's daughter. But it was denied by the whole court upon this general reason; because it is a cause of ecclesiastical cognizance, and divines better know how to expound the law of marriages than the common lawyers; and though sometimes prohibitions have been granted in causes matrimonial, yet if it were now *res integra*, they would not be granted. And it being suggested in that case, that the issue of the marriage would be bastardized in case of a divorce, and deprived of certain lands settled upon them in marriage; the court said, this was not sufficient matter of suggestion, for here the spiritual court held not plea of the temporal inheritance directly, but only consequentially; for which if they should be prohibited, they would have nothing left. *Gibf. 413. Raym. 464. Skin. 37.*

And in the case of *Denny and Ashwell, E. 3 G. 2* a prohibition was denied to a suit in the spiritual court, for a person's marrying his wife's sister's daughter. *Str. 53.*

Evidence.

5. The proof of a marriage may be by witnesses who were present at the solemnization; by cohabitation of the parties; by publick fame and reputation; by confession of the married persons themselves, although their acknowledgement might only be to avoid the punishment of fornication; and by divers other circumstances; which if they amount to half proof, ought to be extended in favour of marriage rather than contrary to it. *Wood. Civ. L. 122.*

But now, since the statute of the 26 G. 2. c. 33. the register book seems to be intended as the proper, although not the only evidence in this matter; for if there shall be any doubt as to the identity of the persons, or the like, the register in this respect can be no evidence at all (*f*).

In the case of *St Devereux and Muchdechurch, E. 2 G. 3.* with regard to the settlement of a poor person, there was proof of a marriage by two witnesses, who swore they were

(*f*) This act doth not take away the evidence of presumption from cohabitation. But if the evidence be clear that the marriage was not celebrated according to the requisitions of the act, it is totally void, and no declaratory sentence in the ecclesiastical court is necessary. *Bull. N P. 114. Rex v. Preston next Travassham, M. 33 G. 2. B. R.* But in some cases an actual marriage must be proved. *Vid. infra, the cases of Morris and Miller, and Birt and Barlow.*

present

present on February the 7th, 1758, when a marriage was solemnized in the parish church of *St Deveraux*, between *John* and *Susannah Meredith* by the minister of the parish by banns. An entry was made in the register, that they were married by banns: but it was not signed by the minister, parties, or witnesses. Lord *Mansfield*, chief justice, held this to be a sufficient proof of the marriage, so as to fix the settlement of the wife in the husband's parish; but said, he would *ex officio* grant a rule upon the minister, to shew cause why an information should not be granted against him, for not attesting the entry agreeable to the statute. *Burrow's Set. Cas.* 506.

In truth, there is a great mistake in many persons, supposing, where an act of parliament inflicteth no special penalty for disobedience, that they may transgress such act, without any danger of being called to account; whereas nothing is more certain, than that where an act appointeth no particular punishment, the offender is liable to be punished by fine and imprisonment, upon indictment or information, at the discretion of the court. So that an act inflicting no particular penalty, is in the highest degree penal; so far as a man's liberty or property may be affected. Which consideration is applicable not only to the present case, where registers are not regularly kept according to the statute; but also to the case, where surrogates shall grant licences to marry in parishes or places where neither of the parties doth inhabit; or where a clergyman shall presume to marry such persons, neither of them being his own parishioner: As also, where a minister shall take upon him to publish the banns, not immediately after the second lesson, as this act requireth; but after the Nicene creed, as was before enjoined by the rubrick. For if a father should attend immediately after the second lesson, to forbid the banns where his child is under age; and no publication being then made, should go away, and the publication afterwards proceed; the clergyman, making such publication, would not be in a desirable situation. Indeed, it doth not appear, why the time, as it is now limited, immediately after the second lesson, is more proper than the other time was, after the Nicene creed; or rather, it seemeth to be less proper, because immediately after the second lesson the publication makes a manifest break and interruption in the service; but after the Nicene creed there is a pause, that part of the service being then completed. However, so
the

the matter stands; and it is not in the discretion of any private person to judge of the propriety or impropriety; and therefore, this being the law, the rubrick after the Nicene creed in this particular ought to be altered; and the rather, as it may prevent a mistake of some persons, who may think that the rubrick in this respect is still in force, not considering, that although the rubrick is confirmed by act of parliament (and is indeed itself part of an act of parliament), yet no maxim in the law is more established, than that a subsequent contrary act virtually repeals a preceding act, so far forth as it is contrary; and may also prevent perhaps another mistake of those who may suppose, that the rubrick, together with the book of common prayer, before it received the sanction of parliament having been drawn up by the clergy in convocation, received its whole force by ecclesiastical authority, and needed no parliamentary confirmation, but, on the contrary, that the parliament have nothing to do with it, either to confirm or alter it. This was once the notion of ecclesiastics; but the foundation thereof was abolished, with the papal power, out of this realm, above 200 years ago. What now remains of it, if any thing doth remain, is a shadow without any substance. An empire within an empire, two distinct legislatures in one kingdom independent of each other, and both of them pretending to be absolute have been long since found to be absurd and incompatible.

In the case of *Morris and Miller*, E. 7 G. 3. The question was, Whether to support an action for a criminal conversation, there must not be proof of an actual marriage? The fact was, they were married at May-Fair chapel. The register or books could not be admitted in evidence, *Keith*, who married them, was transported: and the clerk, who was present, was dead. So that the plaintiff could not prove the actual marriage, by any evidence. But the plaintiff's witnesses proved articles between him and his wife, made after marriage, for the settling of the wife's estate, with the privacy of relations on both sides. They proved cohabitation, name, and reception of her by every body as his wife. Lord *Mansfield* delivered the resolution of the court: In these actions for criminal conversation, there must be proof of a marriage in fact, as contrasted to cohabitation and reputation of marriage arising from thence. Perhaps there need not be strict proof from the register, or by a person present, but strong evidence must be had of the fact; as by a person present at the wedding dinner,

dinner, if the register be burned, and the minister and clerk dead. So also in prosecutions for bigamy, a marriage in fact must be proved. But except in these two cases, I know of none, where reputation is not a good proof of marriage. *Burr. Mansf.* 2057. *Black. Rep.* 632.

E. 19 G. 3. Birt and Barlow. This was an action of trespass and assault for criminal conversation with the plaintiff's wife. It was tried before *Blackstone*, justice; when by direction of the judge the plaintiff was nonsuited. On a rule to shew cause why the nonsuit should not be set aside and a new trial granted, the judge's report was as follows: "The first witness that was called by the plaintiff, was *Thomas Sharpe*, who proved a copy of the register of the parish of St. Alfred Canterbury, in these words, 'John Birt esquire of the parish of St. Margaret Rochester, and Harriet Champneys of this parish, married by banns 15 Dec. 1767, by John Lynch minister. (Witnesses, Robert Lynch, Francis Champneys, Anne Lynch, Elizabeth Lynch.)' (g) Another witness was next called to prove the fact of adultery. I was of opinion, that this was not sufficient evidence of the marriage, but that the identity of the parties must be proved, else it might possibly be a register of the marriage, not of the plaintiff and his supposed wife, but of some other persons of the same name. The counsel for the plaintiff then said, that in course of their examination to prove the adulterous intercourse, it would come out from the mouths of the witnesses, that the plaintiff's reputed wife was of the name and family of Champneys, and that they had long cohabited together, and were esteemed to be man and wife by all their friends and relations. I still thought that the evidence, so opened, would be insufficient, holding, in conformity to the case of *Morris and Miller*, that this was the only civil case in which proof of an actual marriage was requisite, as contradistinguished from acknowledgment by the parties, cohabitation, reputation, and the like: that the best proof that can be given of an actual marriage, is by some person actually present at the solemnity: that in the present case, there

(g) I presume the names of the husband and wife were also subscribed, altho' that was not stated in the report. It is expressly required by the marriage act, 26 G. 2. c. 33. s. 15. *Doug. in note.*

" appeared

“ appeared to have been no fewer than five witnesses present at the marriage thus registered, which was only eleven years ago: that the act had directed the witnesses to subscribe their names to the register, in order to facilitate the investigation of the legal evidence of marriages; and that till these five witnesses were accounted for, as by shewing them all dead or the like, I could not admit less proof than that of some person present to demonstrate the identity of the parties. I accordingly nonsuited the plaintiff. After which, a proctor from the ecclesiastical court, then present; declared openly, that he had been subpoenaed by the plaintiff to prove, and could prove, the taking out a licence for the marriage of the plaintiff and his reputed wife. I mention this circumstance, tho’ it could be no ground of my determination, as it shews something more than a bare possibility that the plaintiff and his wife were not the identical persons so registered as marrying by banns.”—Against the rule for a new trial, it was argued, that the act meant to introduce some more accurate proof of marriages than what was in use before the passing of the act. It therefore enacts, that witnesses shall be present who shall subscribe their names to the register, and the purpose of such subscription must be to point them out, that they may be produced when it shall become necessary to prove the marriage. There is no case in the law where subscribing witnesses are necessary, and yet it is not necessary to produce them, or, if they are shewn to be dead, to prove their hand-writing. The register proved the marriage of two persons of the same names with the plaintiff and his wife, but could not shew that they were the identical persons.—In support of the rule, it was observed, that the preamble to the section of the statute in dispute professes an intention to render the proof of marriages more *easy*, and it would be a strange solecism to construe it so as to render it more difficult. It was admitted, that the proof of the marriage was complete, and no case could be shewn which had determined that there could be no other evidence of the identity of the parties, but the testimony of persons present. Proof of the parties having been seen going to church the morning of the day mentioned in the register, or lying together at night, would surely be evidence of the identity, and so would proof of their having cohabited together from the time of the marriage downwards. In an action for goods furnished to a wife, evidence of cohabitation and reputation is sufficient:

in a case of criminal conversation, something more, namely, an actual marriage must be shewn. This is done by the register; and when it is coupled with evidence of cohabitation and reputation, the proof is compleat. As the copy of the register only was produced (and was all that was necessary), the witnesses could not have proved that attestation, even if they had been called.—Lord Mansfield: From the report it appears, that the ground of the nonsuit was an idea, that the identity must be proved by the minister or some of the attesting witnesses, unless their not being produced is accounted for in the same manner as is required in the case of subscribing witnesses to a deed. The counsel for the plaintiff stated other evidence of the identity; whether such as would have been sufficient when produced (as it might, or might not be, according to the differences arising from the manner of stating it), I give no opinion. But the judge decided, that it was *necessary* to produce some of the subscribing witnesses. The clauses in the marriage act, relative to registers, are of infinite utility to the kingdom. They were meant, as well to prevent false entries, as to guard against illegal marriages without licence or the publication of banns. The registers are directed to be kept as public books, and accompanied with every means of authenticity. But besides facilitating and ascertaining the evidence of marriages, they are intended for other wise purposes. They are of great assistance in the proof of pedigrees, which has become so much more difficult since inquisitions *post mortem* have been disused, that it is easier to establish one for 500 years back before the time of king Charles the second, than for 100 years since his reign. But this advantage would be lost, and it would be very prejudicial, if the act were so construed as to render the proof of marriages more difficult than formerly. I take it for granted, that the law stands as it did before in that respect. Registers are in the nature of records and need not be produced, nor proved by subscribing witnesses. A copy is sufficient, and is proof of a marriage in fact between two parties describing themselves by such and such names and places of abode, tho' it doth not prove the identity. An action for criminal conversation is the only *civil* case, where it is necessary to prove an *actual* marriage. In other cases, cohabitation, reputation, and the like, are equally sufficient since the marriage act as before. But an action for criminal conversation has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes

purposes by persons giving the name and character of wife to women to whom they are not married, it struck me, in the case of *Morris* and *Miller*, that in such an action, a marriage in fact must be proved. I say, a marriage *in fact*, because marriages are not always registered. There are marriages among particular sorts of dissenters, where the proof by a register would be impossible. But as to the proof of *identity*, whatever is sufficient to satisfy a jury, is good evidence. If neither the minister, nor the clerk, nor any of the subscribing witnesses, were acquainted with the married couple, in such a case none of them might be able to prove the identity. But it may be proved in a thousand other ways. Suppose the bell-ringers were called, and proved that they rang the bells, and came immediately after the marriage and were paid by the parties; suppose the hand-writing of the parties were proved; suppose persons called who were present at the wedding dinner; and many other such like. *Wills* and *Aspburst*, justices, were of the same opinion. *Buller*, justice: The original register is not necessary to be produced; and it is only where that is required, that subscribing witnesses must be called. In this case, the wife's maiden name was *Harriet Champneys*. Suppose a maid servant had proved that she always went by that name till the day of the marriage, that she went out that day, and on her return, and ever since, was called Mrs. *Birt*: surely that would have been evidence of the identity.—And the rule for a new trial was made absolute. [The cause was tried again at the next assizes, and a verdict found for the plaintiff.] *Douglas*, 171.

Sentence in the
spiritual court
conclusive, [and
where not.]

6. H. 7 G. 2. Before lord *Hardwick* chief justice, at *nisi prius* in Middlesex. There was an action for maliciously procuring the plaintiff's wife to exhibit articles of the peace against him, and for living with her in adultery. The plaintiff proved a marriage, by the parson and a woman, and also the consummation. To encounter which the defendant produced a sentence of the consistory court of London, in a cause of jactitation of marriage brought by the woman against the plaintiff, wherein she was declared free from all contract, and perpetual silence imposed upon the plaintiff: which sentence was pronounced since issue joined in this cause. And the chief justice ruled this to be conclusive evidence, till reversed by appeal. *Str.* 960.

And a few days afterwards, at Guildhall, in another cause, between *Dacosta* and *Villa Real*, which was an action

tion upon a contract of marriage *per verba de futuro*, brought by the gentleman against the lady, who pleaded *non assumpsit*; when the plaintiff had opened his case, the defendant offered in evidence a sentence of the spiritual court in a cause of contract, where the judge had pronounced against the suit for a solemnization in the face of the church, and declared Mrs. *Villa Real* free from all contract. And the chief justice held this to be proper and conclusive evidence on *non assumpsit*; that it was a cause within their jurisdiction, tho' the contract was *per verba de futuro*, and tho' the suit there is *diverso intuitu*, being for a specific performance, as far as admonition will go; and this, for damages. Yet contract or no contract is the point in issue in both. And the plaintiff was nonsuit. And herein was cited the case of *Hatfield* against *Hatfield*, in the house of lords, in the year 1725; where, on an appeal from Ireland, the case was, that a woman brought a bill against her supposed husband's son by a former wife; he insisted, she never was married to his father, but to one *Porter*, whose marriage with her was proved, and a release from him. She upon this sued *Porter* in the spiritual court in a jactitation cause, and obtained sentence against him; and then made that her case in chancery, where it was held to be conclusive evidence. And the opinion was affirmed here upon appeal. *Str.* 961.

And in the common pleas, *M.* 11 G. 2. *Prudham* against *Philips*; *Rescue* chief justice held such a sentence conclusive, and would not receive evidence of fraud or collusion in obtaining it. *Str.* 961. (b)

XI. Divorce.

(b) A fuller note of this case, taken by Sir Thomas Parker then a serjeant, is given in *Ambler*, 761. It was an action of *assumpsit* by *Prudham* against *Con. Philips*. The defendant gave in evidence her marriage with *Muilman*, in answer to which the plaintiff produced a sentence of the ecclesiastical court, by which it appeared that she was at that time married to another person of the name of *Delafield*, which his counsel relied on as conclusive evidence of the nullity of such pretended marriage with *Muilman*. The defendant offered to prove that the sentence was obtained *per fraudem*; but *Wilkes*, C. J. after much debate, took a distinction between the case of a stranger who cannot come in and reverse the judgment, and therefore must of necessity be permitted to aver that it is fraudulent, and the case of one who is party to the proceedings.

XI. Divorce.

Causes of divorce.

1. By the canon law a divorce is not permitted without sufficient cognizance had of the cause. But by the civil law,

ings. If he plead that the judgment was fraudulent, he cannot give evidence of it, but must apply to the court which pronounced the sentence to vacate the judgment: and if both parties colluded, it was never known that either of them could vacate it. The defendant in this case was party to the suit, and cannot have redress here.

The following case has since occurred on this subject: *Meadows v. the Duchess of Kingston*, 27 & 28 June 1775, in *chancery*. Amb. 756. Evelyn late duke of Kingston married the defendant, and on the marriage made a settlement of 4000 l. a year upon her by way of jointure, charged upon certain estates. He afterwards made his will, and gave her, by the description of *his wife Elizabeth duchess of Kingston*, all his other estates (which together with the jointured estates were about 16,000 l. a year) during her widowhood, subject to a provision made for payment of debts thereof with limitations over. He also by his will gave to the defendant, by same description, all his personal estate discharged from payment of debts, and also made her sole executrix. A bill was filed by the plaintiff in right of his wife, who being sister was heir at law and next of kin to the duke, stating that the devise in the will of the personal estate to the defendant as his wife was founded in a fraud, committed by the defendant in imposing herself upon the duke as a single woman, and thereby inducing him to marry her, when in fact, at the time of the marriage, she was the lawful wife of Augustus John Hervey, since earl of Bristol; and that the *quality of wife* of the said duke of Kingston was an essential part of the description, and expressed the cause of the bequest; which failing, the defendant ought to be considered as a trustee for the next of kin. To this the defendant pleaded, that being lawfully married to the duke, he cohabited with her to his death, and that she proved his will in the prerogative court of the archbishop of Canterbury. That a suit in the consistorial court was instituted by her against Mr. Hervey for jactitation of marriage, and a cross allegation by Mr. Hervey was put in, insisting that he was married to her, stating the particular circumstances of the marriage, and praying the court to pronounce that he and the defendant were lawfully man and wife. And that upon hearing the cause on the 10th of Feb. 1769, the judge, by his definitive and final sentence, declared that the defendant, then Elizabeth Chudleigh, at and during all the

law, divorces were often made thro' heat of anger, when the Romans had a mind to put away their wives, by sending

the time mentioned in her said libel was, and then was a spinster, and free from all matrimonial contracts or espousals (as far as appeared), more especially with the said Augustus John Hervey; and that the said Augustus John Hervey did maliciously boast, and publicly assert (though falsely), that he was contracted in marriage to the defendant, or that they were joined or contracted together in matrimony; and that, therefore, the judge of the said court, thereupon, by such definitive sentence or final decree, also pronounced, decreed, and declared that perpetual silence must, and ought to be imposed and enjoined on the said Augustus John Hervey, as to the matters contained in the defendant's said libel; and accordingly did impose and enjoin perpetual silence on him as to such matters; and decreed that he should be admonished to desist from his boasting and asserting that he was contracted to or conjoined with the defendant in matrimony as aforesaid; and also condemned the said Augustus John Hervey in the costs of the suit. The defendant then averred, that the duke was informed of and privy to this suit, and denied that he was ever drawn in to marry her by any fraud or imposition whatever.

Lord Apsley, chan. after argument. The plea states the sentence of the ecclesiastical court, to shew that the defendant was not, at the time she married the duke, the wife of Mr. Hervey. First question, Whether the plea reduces the matter to a point? Second, If it does, whether it is conclusive? As to the first, it clearly brings the matter to a point, whether the defendant was not the wife of Mr. Hervey but a single woman. As to the second: by *conclusive*, I understand that the court will not receive evidence to contradict it. I lay it down as a general rule, that wherever a matter comes to be tried in a collateral way, the decree, sentence, or judgment of any other court, having competent jurisdiction, shall be received as conclusive evidence of the matter so determined. Though Oughton may be right, and Mr. Hervey might at any time have sued for restitution of conjugal rights, notwithstanding this sentence; yet the sentence is conclusive evidence in collateral actions till it is reversed, or overturned by some other sentence.—The only exception to the rule is where the sentence is not *ex directo*, as in *Blackham's case* *.

Here

* *Blackham's case*, before Holt, C. J. at *nisi prius*. 1 Salk. 290. In trover, the case was, the plaintiff proved the goods to be in his possession, and to be taken away by the defendant. The defendant shewed that these were the goods of one Jane Blackham, in her lifetime, and that the defendant had taken out letters of administration

ing them a bill of divorce by one of their freed-men, who
was

Here is no suggestion of fraud in the bill; and if there was, it is that kind of fraud which the court would not go into. Fraud upon a court, in obtaining judgment or sentence, can only be examined by the court where the fraud is committed, or another court having concurrent jurisdiction. This court has not concurrent jurisdiction in marriages.

But on the trial of the duchess afterwards for bigamy, before the house of peers in 1776, after pleading not guilty, she produced the sentence of the consistorial court as above stated, which her counsel insisted was conclusive in her favour. This point being fully argued, the following questions were referred by their lordships to the judges:

- I. Whether a sentence of the spiritual court against a marriage, in a suit for jactitation of marriage, is conclusive evidence, so as to stop the counsel for the crown from proving the said marriage in an indictment for polygamy?
- II. Whether, admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion?

Upon which questions Sir Wm. De Grey, C. J. C. B. delivered the unanimous opinion of the judges:

1st, That a sentence in the spiritual court against a marriage in a suit of jactitation of marriage is not conclusive evidence, so as to stop the counsel for the crown from proving the marriage in an indictment for polygamy.

2dly, Admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion.

to her, and so was entitled to her goods. Upon this the plaintiff proved, that some few days before her death she was actually married to him; and in answer to that it was insisted that the spiritual court had determined the right to be in the defendant: for they could not have granted administration to the defendant, but upon supposing there was no such marriage, and that this sentence being of a matter within their jurisdiction, was conclusive and could not be gainsaid in evidence. And *per Holt, C. J.* a matter which has been directly determined by their sentence cannot be gainsaid. Their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary. But that is to be intended only in the point directly tried; otherwise it is, if a collateral matter be collected or inferred from their sentence, as in this case, because the administration is granted to the defendant; therefore they infer that the plaintiff was not the intestate's husband, as he could not have been taken to be, if the point there tried had been married or unmarried, and their sentence had been not married.

And

was to acquaint the wife with the purpose and intention of her husband. *Ayl. Par.* 225. (i)

Dr. Ayliffe says, By the papal canon law there are only five causes of divorce; to wit, adultery, impotency, cruelty, infidelity, and entering into religion. *Ayl. Par.* 226.—Unto which ought to have been added consanguinity.—[And according to our law, which in this point follows the canon law, by a late decision of the delegates, may be added sodomitical practices (k).]

2. There

And the principal reasons given by the chief justice for this opinion were, first, because the parties are not the same; for the king, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the ecclesiastical court, and cannot be admitted to defend, examine witnesses, in any manner intervene, or appeal. Secondly, such doctrines would tend to give the spiritual courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs. *Vide tamen, Wills, Probate, 23.*

(i) It is said, to the honour of the antient Romans, that divorces were unknown to them till the year of Rome 423. when *Spurius Carvilius* finding his wife barren put her away, “although” says *A. Gellius*, “he loved her extremely, and she was most dear to him on account of her morals.” *Lib. 4. c. 3.* This he was induced to do from a scruple of conscience, having been compelled by the censors to swear that he married for the sake of procreating children. The manners of the people, however, growing more corrupt, divorces became more common, but were restricted to certain just causes by the emperors; particularly by Theodosius and Valentinian, in a law preserved in *Cod. 5. 17.* and by Justinian in *Nov. 117. c. 8 & 9.* The latter emperor disapproved of dissolving the contract of marriage by the mutual consent of husband and wife; but his grandson Justin restored the antient law, observing that it was difficult to reconcile those who once hated each other violently, and who, if they were compelled to live together, frequently attempted each other’s lives. *Nov. 140.* But for this constitution he has been severely blamed.

(k) Lady Bromley libelled her husband Sir George Bromley, in the consistorial court of York, founding her claim to a divorce *a mensa et thoro*, on a verdict of a jury that Sir George was guilty of sodomitical practices with A. B. for which he was sentenced to two years imprisonment in the gaol at Nottingham. The judge rejected the libel, and Lady Bromley appealed to the delegates.

“ appeared to have been no fewer than five witnesses present at the marriage thus registered, which was only eleven years ago: that the act had directed the witnesses to subscribe their names to the register, in order to facilitate the investigation of the legal evidence of marriages; and that till these five witnesses were accounted for, as by shewing them all dead or the like, I could not admit less proof than that of some person present to demonstrate the identity of the parties. I accordingly nonsuited the plaintiff. After which, a proctor from the ecclesiastical court, then present; declared openly, that he had been subpoenaed by the plaintiff to prove, and could prove, the taking out a licence for the marriage of the plaintiff and his reputed wife. I mention this circumstance, tho’ it could be no ground of my determination, as it shews something more than a bare possibility that the plaintiff and his wife were not the identical persons so registered as marrying by *banns*.” — Against the rule for a new trial, it was argued, that the act meant to introduce some more accurate proof of marriages than what was in use before the passing of the act. It therefore enacts, that witnesses shall be present who shall subscribe their names to the register, and the purpose of such subscription must be to point them out, that they may be produced when it shall become necessary to prove the marriage. There is no case in the law where subscribing witnesses are necessary, and yet it is not necessary to produce them, or, if they are shewn to be dead, to prove their hand-writing. The register proved the marriage of two persons of the same names with the plaintiff and his wife, but could not shew that they were the identical persons. — In support of the rule, it was observed, that the preamble to the section of the statute in dispute professes an intention to render the proof of marriages more *easy*, and it would be a strange solecism to construe it so as to render it more difficult. It was admitted, that the proof of the *marriage* was compleat, and no case could be shewn which had determined that there could be no other evidence of the *identity* of the parties, but the testimony of persons present. Proof of the parties having been seen going to church the morning of the day mentioned in the register, or lying together at night, would surely be evidence of the identity, and so would proof of their having cohabited together from the time of the marriage downwards. In an action for goods furnished to a wife, evidence of cohabitation and reputation is sufficient:

in

in a case of criminal conversation, something more, namely, an actual marriage must be shewn. This is done by the register; and when it is coupled with evidence of cohabitation and reputation, the proof is compleat. As the copy of the register only was produced (and was all that was necessary), the witnesses could not have proved that attestation, even if they had been called.—Lord *Mansfield*: From the report it appears, that the ground of the nonsuit was an idea, that the identity must be proved by the minister or some of the attesting witnesses, unless their not being produced is accounted for in the same manner as is required in the case of subscribing witnesses to a deed. The counsel for the plaintiff stated other evidence of the identity; whether such as would have been sufficient when produced (as it might, or might not be, according to the differences arising from the manner of stating it), I give no opinion. But the judge decided, that it was *necessary* to produce some of the subscribing witnesses. The clauses in the marriage act, relative to registers, are of infinite utility to the kingdom. They were meant, as well to prevent false entries, as to guard against illegal marriages without licence or the publication of banns. The registers are directed to be kept as public books, and accompanied with every means of authenticity. But besides facilitating and ascertaining the evidence of marriages, they are intended for other wise purposes. They are of great assistance in the proof of pedigrees, which has become so much more difficult since inquisitions *post mortem* have been disused, that it is easier to establish one for 500 years back before the time of king Charles the second, than for 100 years since his reign. But this advantage would be lost, and it would be very prejudicial, if the act were so construed as to render the proof of marriages more difficult than formerly. I take it for granted, that the law stands as it did before in that respect. Registers are in the nature of records and need not be produced, nor proved by subscribing witnesses. A copy is sufficient, and is proof of a marriage in fact between two parties describing themselves by such and such names and places of abode, tho' it doth not prove the identity. An action for criminal conversation is the only *civil* case, where it is necessary to prove an *actual* marriage. In other cases, cohabitation, reputation, and the like, are equally sufficient since the marriage act as before. But an action for criminal conversation has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes

Two kinds of divorce.

2. There be two kind of divorces: the one that dissolveth the marriage, *a vinculo matrimonii*, as for consanguinity; and the other *a mensa et thoro*, as for adultery; because that divorce by reason of adultery cannot dissolve the marriage *a vinculo matrimonii*, for that the offence is after the just and lawful marriage. 3 *Inst.* 88.

A vinculo.

3. Causes for separation a vinculo, are consanguinity or affinity within the degrees prohibited, also impuberty or frigidity; where the marriage itself was merely void ab initio, and the sentence of divorce only declaratory of its being so. Inasmuch that in debt upon an obligation, tho' the defendant pleaded that at the time of the bond she was wife to a person there named; yet the plaintiff shewing that a former wife was alive at the time of his marrying the defendant, and that thereupon the marriage with him had been adjudged null and void in the spiritual court, judgment was given against her, because the marriage being merely void, she was always sole: and it was further said, that in such case the divorce was only declaratory, and there needed not any such sentence. *Cra. El.* 857. *Gibb.* 446.

The effects of that original voidance and nullity are, that the wife is barred of dower, and the issue are illegitimate; and that the persons so divorced may marry any others. *Gibb.* 446.

Concerning divorce a vinculo in case of *impuberty*, or the male or female's marrying under the marriageable years, that is, the first under fourteen, or the second under twelve; the books of common law do confirm and ratify this nullity; not only by declaring, that in case of such divorce, the woman may have an assize for the land given in frank marriage, but also in affirming further, that tho' the man hath issue by such marriage, and is divorced, and

For the respondent it was objected, that there was no case where even actual sodomy had been deemed a sufficient cause for a divorce; *a fortiori*, a mere attempt to commit it, could not be deemed sufficient. That supposing it to be a sufficient cause, the libel ought to have stated the facts from which the guilt was to be inferred, which should have been again the subject of proof: and that merely stating the verdict, and producing the record of it, could not entitle the lady to a divorce. But the judges (Gould, J. C. B. Hotham, B. and Giese, J. K. E. Drs. Fisher and Crespigny) thought the objections insufficient; reversed the sentence of the court below, and pronounced for the divorce. *Fib.* 1794.

marries

marries again and hath issue, and dies, the issue of the second wife shall be his lawful heir; nor will any averment of consenting and living together after the marriageable years be received or admitted in the temporal court, after a divorce in the spiritual court made upon the original nullity, and unrepealed. *Gibf. 446. (l)*

In like manner, do the books of common law resolve, in case of divorce *a vinculo* for *frigidity*, after three years trial and examination, and sentence in the spiritual court, for the perpetual impotency of generation. As it was in *Bury's case*, *M. 40 & 41 El.* who was so divorced, but afterwards married another wife, and had children by her: upon which it was urged, that the church being evidently deceived as to his perpetual impotency, the divorce thereupon was null; and if so, that the second marriage was unlawful, and the issue illegitimate. But the court resolved, that since there had been a divorce for frigidity or impotency, it was clear that each of them might lawfully marry again; and tho' it should be allowed, that the church appearing to have been deceived in the foundation of their sentence, the second marriage was voidable, yet till it should be dissolved, it remained a marriage, and the issue during the coverture lawful. *Gibf. 446. (m)*

But tho' a sentence of divorce, given in the spiritual court, may be repealed after the death of the parties; yet if any of the parties be dead, before such sentence given, suit cannot be in the spiritual court to declare the marriage void, and bastardize the issue; the marriage being already dissolved by death, and the trial whether legitimate or not, in order to inheritance, originally belongeth to the king's court; and the sentence in the spiritual court being given only *pro salute animæ*, it comes too late. *Gibf. 446. Vinet, Baff. G. 4.*

4. Divorce *a thoro et mensa* is, when the use of matrimony, as the cohabitation of the married persons, or their mutual conversation, is prohibited for a time, or without limitation of time. And this is in cases of adultery (*n*), cruelty,

(l) 7 Rep. 42. *Kenn's case.*

(m) 5 Rep. *Bury's case.*

(n) Adultery is a cause of divorce from bed and board, by the ecclesiastical law; and such divorce is to be obtained in the ecclesiastical court. But if the party injured wish to marry again, application must be made to parliament for an act of

cruelty, or the like; in which the marriage having been originally good, is not dissolved, nor affected as to the vinculum or bond. And this is so by the common as well as by the canon law; insomuch that the wife so divorced, having sued for a legacy left to her, and the husband having given a release, such release hath been adjudged good, notwithstanding the divorce. Nor doth this kind either bar the wife of her dower, or bastardize the children; but entitles her to alimony, which the ecclesiastical court assigns, in proportion to the circumstances and condition of her husband; and no prohibition will lie. But as to the having again the goods she brought, or so much as is not spent; that, in the law books, is meant only of divorce *a vinculo*, or when there was a nullity of marriage ab initio, so as to be really no marriage. *Gibb. 335.*

But the children which she hath after the divorce, shall be deemed bastards; for a due obedience to the sentence will be intended, unless the contrary be shewed. *1 Salk. 123.*

By *Can. 107.* In all sentences pronounced only for divorce and separation *a thoro et mensa*, there shall be a caution and restraint inserted in the act of the said sentence,

the legislature to dissolve the marriage entirely, and to grant such permission. This, however, cannot be obtained if the party complaining should appear to have connived at the adultery, or to have been guilty of gross misconduct in the marriage state; and it has therefore been usual to sue the adulterer previously for damages in a civil action of criminal conversation, in which the proof of these facts would furnish a strong ground of defence, and where it may naturally be supposed they would be proved, if true, in mitigation of damages. But this mode of procedure cannot be adopted where the adulterer dies, or where the act of adultery was committed after a separation between the husband and wife. For the foundation of the action on the part of the husband is the loss of the comfort and society of his wife, which he cannot be supposed to have estimated very highly, when he has consented to dispense with them. *Weldon v. Timbrell, 5 Term Rep. 357.* It cannot either be resorted to where the wife complains of the adultery of the husband; and appears to be nugative where the adulterer is of very low degree, as a menial servant: whence it cannot be considered as absolutely necessary. There is an admirable rule of the canon law on this subject, *Nullus ducat in matrimonium quam prius peccavit adulterio. C. 31. Q. 1. c. 1.*

that

that the parties so separated shall live chafte-ly and continent-ly; neither shall they, during each other's life, contract matrimony with other person. And for the better ob-ervation of this laft clause, the faid sentences of divorce fhall not be pronounced, until the party or parties requiring the fame, have given good and fufficient caution and fecu-rity into the court, that they will not any way break or transgreff the faid restraint or prohibition.

And this doctrine, that neither of the parties fhall con-tract matrimony during each other's life, hath been con-firmed by the temporal judges in the cafe of *Foliambe*, who having been divorced from his wife for incontinen-ty on her part, married again during her life; and the fecond marriage was declared to be void, becaufe it was only a divorce *a thoro et menfa*. And the fame is the doctrine of the canon law; and of the fame tenor are the ancient conftitutions of the Englifh church. Neverthelefs divers acts of parliament, for the divorce of particular perfons in the cafe of adultery, agreably to what the *R. formatio legum* did propofe in general, have allowed a liberty to the in-nocent perfon of marrying again. *Gibf. 446. Mo. 683.*

And by *Can. 108.* If any judge, giving fentence of di-vorice or feparation, fhall not fully keep and obferve the premisses; he fhall be, by the archbifhop of the province, or by the bifhop of the diocefe, fufpended from the ex-ercife of his office for the fpace of a whole year; and the fentence of feparation fo given, contrary to the form aforefaid, fhall be held void to all intents and purpofes of the law, as if it had not at all been given or pro-nounced.

A divorce for *adultery*, was antiently *a vinculo matrimo-nii*; and therefore in the beginning of the reign of queen Elizabeth, the opinion of the church of England was, that after a divorce for adultery, the parties might marry again; but in *Foliambe's* cafe aforefaid. *H. 44 El.* in the ftar chamber, that opinion was changed; and archbifhop Ban-eroft, by the advice of divines held that adultery was only a caufe of divorce *a menfa et thoro*. *3 Salk. 138. (o)*

5. *Can. 105.* Forasmuch as matrimonial caufes have been always reckoned and reputed amongft the weightieft, and therefore require the greater caution when they come to be handled and debated in judgment, efpecially in caufes

Divorce not to
be on confeffion
of the parties

(o) Ὁ δὲ ὁ Θεὸς συνίζουσι ἀφ' ἑαυτῶν μὴ χαρίζεται. MARK. 10.
9. C. 32. 2. 7. c. 1.

wherein matrimony, having been in the church duly solemnized, is required upon any suggestion or pretext whatsoever to be dissolved or annulled; we do straitly charge and injoin, that in all proceedings to divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as is possible) be sifted out by the deposition of witnesses and other lawful proofs and evictions, and that credit be not given to the sole confession of the parties themselves, howsoever taken upon oath, either within or without the court.

The rule of the canon law upon this head, is in a decretal epistle of pope *Celestine* the third; who injoineth, that the parties be not separated by their own confession only, or by the rumour of the neighbourhood: For if they did believe that the ecclesiastical judge would concur with them, some persons would collude together, and confess incest, for the avoiding of their marriage: And the rumour of the neighbourhood ought not so far to be judged valid, as to disannul marriages; unless other reasonable and probable evidences do occur. *Gibf.* 445. (?)

This prohibition against accepting the sole confession of the parties, was expressly renewed in the canons of 1597. And how great need there was of such a prohibition, will appear to an one who shall consult the ancient acts of courts before those times, and shall see there how common it was to pronounce separations upon the sole confession of the parties, and how numerous these separations were, so long as that continued to be the rule. *Gibf.* *ibid.*

In 2 *Mod.* 314. there is a remarkable instance of this kind; wherein a prohibition was prayed in behalf of the children, who were in danger to be bastardized by such a fraud. *Collet* married *Mary*, and had children by her; against whom it was libelled in the spiritual court, that he had before married *Anne* the sister of *Mary*: He and *Anne* appear, and confess the matter; upon which, (as the report sets forth) a sentence of divorce was to pass. Whereas in truth, *Collet* was never married to *Anne*, but it was a contrivance between him and his wife to get themselves divorced, after they had lived together sixteen years. *Gibf.* 445.

And sometimes women were suborned to personate the wife, who were to come and confess the adultery; and so

the real wife might be divorced whilst she knew nothing at all of the matter. And Mr. Clerke says, he knew two instances in his time, where supposititious women (not the wives of the parties) were suborned to come and confess the adultery, as if they had been the real and true wives.
1 *Ought.* 316.

6. If the party accused shall prove, that the accuser hath also committed adultery; this is a compensation for the crime, and the accuser shall not prevail in his suit. 1 *Ought.* 317. What shall be deemed a compensation of the crime.

In like manner, if the party accused shall prove, that the accuser before the commencement of the suit had probable knowledge of the crime committed, and yet afterwards had carnal intercourse with the accused; in such case, the accuser shall not obtain a sentence of divorce: for the crime shall be supposed to have been remitted.
1 *Ought.* 317.

And probable knowledge in this case is, if the husband, suspecting his wife, shall charge her with the offence, and she confess it: Or if the witnesses, whom he shall afterwards produce, shall signify to him before the commencement of the suit, that they can testify the offence from their own sight and knowledge: Or if the husband shall take her in the act of adultery: In all which cases, nevertheless, if the husband shall afterwards have carnal knowledge of his wife, he remitteth the injury, and shall not have a divorce. Therefore if he desires to be divorced, he must abstain from her bed, although he doth not presently turn her out of doors. 1 *Ought.* 317.

7. *Can.* 106. No sentence shall be given either for separation *a thoro et mensa*, or for annulling of pretended matrimony, but in open court, and in the seat of justice, and that with the knowledge and consent either of the archbishop within his province, or of the bishop within his diocese, or of the dean of the arches, the judge of the audience of Canterbury, or of the vicars general, or other principal officials, or sede vacante of the guardians of the spiritualities, or other ordinaries to whom of right it appertaineth, in their several jurisdictions and courts, and concerning them only that are then dwelling under their jurisdictions. Sentence of divorce.

8. *M.* 1 *Car.* *Green's case.* *Green* prayed a prohibition to the ecclesiastical court at Salisbury, because his wife sued him there to be separated from him, *propter sevitiam*. And sentence was there given for the husband against the wife; and he was enforced to pay all the costs for his wife. Costs.
And

And afterwards she appealed; and because the husband would not answer the appeal against himself, and pay for the transmitting of the record, he was therefore excommunicated; and now prayed a prohibition. The court conceived the case to be very hard, that he should be enforced to spend his money against himself. But because it was alledged, that the course was so in the spiritual court, they would advise until the next term; and ordered to stay their proceedings in the mean time. *Gre. Car.* 16.

XII. Alimony.

Alimony of ecclesiastical cognizance.

1. The ordinary hath the proper cognizance of alimony, and no other court: It is true, there lies an appeal, but still it is to the ecclesiastical judge; and if the person condemned will not obey the sentence of that judge, he may be excommunicated. *Ayl. Par.* 59. (1)

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(1) The court of chancery will also in some cases decree alimony to the wife; but Mr. Fonblanque observes that this has seldom been done except upon an agreement of the parties, or a divorce. See the cases cited in *Treat. of Eq.* p. 96, 97. To alimony may be compared that *separate maintenance* which has become so frequent in these days; but they differ in this amongst other respects, that the former is established by the judicial act of a court of justice, the latter proceeds merely upon the agreement of parties. By this agreement, according to lord Mansfield in the case of *Corbet v. Paelnitz*, 1 *Term Rep.* 5. "A married woman assumes the appearance of a *feme sole*, and is to all intents and purposes capacitated to act as such." And if during the separation she contract a debt, and afterwards be divorced and marry a second husband, he is liable for it. And the reason given by the court, is, that her incapacity is not like that of an infant founded on want of judgment, but on want of property; whenever therefore she is possessed of property, her incapacity ceases: nor is her liability limited to the extent of her fund; for if, says Mr. J. *Albburst*, she exhausts her whole fund, it is her folly, but does not render her less liable; see the opinion of lord Thurlow, C. in *Hulme v. Tenant and his wife*, 1 *Bro.* 16.

But to exonerate the husband, the property must proceed from him, or at least must be secured to the sole use of the wife; for a pension from the crown of 300l. *per ann.* during *placet*, to a wife, though given to her in her own name, was not deemed sufficient to make her answerable for necessities, where her husband had shut his door against her, without any agreement

In the case of *Angier and Angier*, T. 1718: The wife by her next friend brought a bill against her husband, for a special execution of articles, whereby he had agreed with a friend of hers to allow her 52 l a year separate maintenance. Great misbehaviour to each other was proved in the cause. And it was proved by him, that she had libelled in the spiritual court for alimony; and when that cause

agreement for a separate allowance. *Thompson v. Harvey*, 4 Bur. 2177. Therefore the courts have required that it should appear that the wife has a fixed permanent fund for her support, over which the husband has no controul; see *Compton v. Collison*, 2 Bro. 377. and 1 H. Bl. 334. *Gilchrist v. Brown*, 4 T. Rep. 766. and *Ellab v. Leigh*, 5 T. Rep. 679. Where that was the case, as on the one hand they have held the wife answerable for her debts, they have also assisted her in the recovery or transfer of her property; for where a wife was separated from her husband by articles, and he covenanted both at the time of separation, and since certain copyhold lands descended to her, "that she should enjoy to her own use, all real and personal estate that might in any manner come to her, and that he would join in levying a fine, suffering a recovery, or making a surrender of such estates, and in limiting the same to such uses as she should appoint:" the court of C. P. held, on an issue from chancery, that the wife may surrender the copyhold lands without the husband joining, and without a special custom for that purpose. *Compton v. Collison* above cited. The general doctrine, however, that a married woman can be sued as a *feme sole*, except where her husband is exiled, or has abjured the realm, or become an alien enemy, has been doubted in some cotemporary cases; see *Hatchett v. Baddely*, 2 Bl. 1079. *Lean v. Schutz*, ib. 1195. and *Ld. Kenyon's* opinion in *Ellab v. Leigh*. But should it ultimately be received as law, there seems to be no reason why it should not be extended to a married woman having alimony decreed to her by a definitive sentence of the ecclesiastical court; except it should be said that the subsequent incontinency of the woman (being an infraction of the caution required by the canon upon a divorce) might be a reason for the court to retract the alimony, or that the woman has not so effectual a remedy for the recovery of her alimony, as she has for that of her separate maintenance. But that alimony decreed to a wife during the continuance of a suit, is not a ground to sue her as a single woman, has been decided in the case of *Ellab v. Leigh*, 5 T. Rep. 679. for it is not a permanent fund over which the husband has no controul; but on the contrary, by ending the suit he may determine the alimony.

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was depending there, these articles were made; and that he was desirous to be reconciled to her, and therefore stopped the allowance: It was objected, that this would be decreeing a separation; which belongs to the spiritual court: Alimony continues only till the parties are reconciled; and if the articles should be decreed, a future reconciliation could not set them aside. But the lord chancellor decreed an execution. He said it was no invasion upon the spiritual court; and if not decreed here, they can be of no force any where; for the spiritual court cannot decree a performance of them. If the husband make a separate provision for her, he is not at law chargeable with her debts. And he ordered the master to settle an indemnity for him against her debts; and decreed the arrears; and said, it was not a decree for alimony or separation; for when they come together again, the articles would be no longer binding. *Proc. Cha.* 496.

To be only
while the par-
ties live separate.

2. A wife cannot sue for alimony, during the cohabitation. *4 Vin.* 176.

And although they be separated, yet if the husband maintains the wife, it bears her claim in respect thereof. *Id.*

Also if she elopes from her husband, the law will not compel the husband to allow her alimony. *Ayl. Par.* 58.

Wife may dis-
pose thereof.

3. A wife having separate allowance, and being separated, may make a gift of what she saves, as a feme sole. *Vin. ibid.*

And in the case of *Dutton and Dutton*, *T. 1 G.* Lord chancellor Cowper allowed the wife to keep the plate which she had bought, or had been given to her, during the separation. *Id.*

So if she sue for defamation or other injury, and has costs, and the husband releases them, this shall not bar the wife; for these costs come in lieu of what she hath spent out of her alimony, which is a separate maintenance, and not in the power of her husband. *1 Salk.* 115.

XIII. Elopement.

Wife living
with the hus-
band.

1. *E. An. Robinson and Greinold.* By Holt chief justice: Though the wife be ever so lewd, yet while she cohabits with her husband, he is bound to find her necessaries, and to pay for them; for he took her for better for worse: so if he

he runs away from her, or turns her away. But if she goes away from him; when such separation becomes notorious, whoever gives her credit, doth it at his peril: for the husband is not liable, unless he takes her again; for then it is as if a woman had eloped at common law, she thereby lost her dower; but if she came again, and the husband received her, the right of dower is revived. 1 *Salk.* 119. (r)

2. *M. 8 W. Todd and Stokes.* The plaintiff was an Separating by apothecary, and served the defendant's wife with physick, ^{consent.} who lived separate from her husband, and had a separate allowance of 20 l a year. And by *Holt* chief justice: If husband and wife separate by consent, and she hath a separate allowance; it is unreasonable she should have it still in her power to charge him; and it is to be presumed, that tradesmen that deal with her trust her on her own credit, and not on the credit of her husband; and a personal notice is not necessary, it is sufficient that it be publicly and commonly known. 1 *Salk.* 116. *L. Raym.* 444.

3. *H. 10 W. Longworthy and Hockmore.* It was ruled Turned away. by *Holt* chief justice, that if a husband turn away his wife, and afterwards she takes up necessities upon credit of a tradesman; the husband shall be liable to the tradesman to pay for them. But if the wife elopes, though the tradesman hath no notice of the elopement, if he gives credit to the wife, the husband is not liable. If the wife tells her husband that she will buy such a thing, which is necessary, and the husband tells her that he will not allow it, and forbids the tradesman to give his wife credit for it, and afterwards the wife takes up that thing of the same tradesman, upon credit given her by him; the husband is not liable. It is sufficient for the husband to give general notice, that people do not give credit to his wife. *L. Raym.* 444.

E. 2 An. Etherington and Parrot. By *Holt* chief justice: If a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessities for her. But if she runs away from her husband, he shall not be bound to any contract she makes. On the other side, while they cohabit, the husband shall answer all contracts of hers for necessities; for his assent shall be pre-

(r) See the cases on this subject collected by Mr. Nolan in his note to the case of *Bolton v. Prentice*, *Sira.* 1214.

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fumed to all necessary contracts, upon the account of cohabiting, unless the contrary appear. But if the contrary appear, as by notice, there is then no room for such a presumption. 1 *Salk.* 118. \

M. 18 G. 2. Bolton and Prentice. In *assumpsit* for goods sold and delivered to the defendant's wife, the case appeared to be, that the defendant and his wife had formerly lodged at the plaintiff's house, and the plaintiff furnished her with goods; and the defendant finding the plaintiff had helped her to pawn her watch, and suspecting he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever to trust her again. After this, the defendant and his wife cohabited together for a year; when, without any cause appearing, he left her, locked up her cloaths, and upon her finding him out, refused to admit her, and struck her, and declared he would not maintain her, or pay any body that did. In this distress she borrowed cloaths of her friends, and applied to the plaintiff, who furnished her with necessaries according to the defendant's degree; which the defendant refusing to pay for, this action was brought: and upon trial the jury found for the plaintiff. Upon motion for a new trial, the court held the verdict was right; for whilst they were at the plaintiff's, there was a particular reason for the particular prohibition; yet the causeless turning her away destitute afterwards, gave her the general credit again: and if a husband should be allowed, under the notion of a particular prohibition, to destroy her obtaining credit in one place, he may in the same manner prevent it with all people she is acquainted with. He appears to be a wrong doer, and therefore has no right to prohibit any body. *Str.* 1214.

Leaving the
husband without
consent.

4. *T. 4 G. 2. Child and Hardyman.* Action for linen sold to the defendant's wife. Upon *non assumpsit*, the delivery was proved. And the defendant proved that she had lived in a very lewd manner; one Mr. *Nott* frequently coming to her at her husband's house, and they were locked up together in a bed-chamber, and other indecencies passed between them. And it was also proved, that she several times went to the house of this *Nott*, a gentleman in *Wiltshire*, who lived within three miles of the defendant's house. It did not appear farther than that he disliked her going and staying at Mr. *Nott*'s. But under these circumstances, the husband and wife continued to live together. Afterwards, she went away from him, and went to *Marlborough*, where she resided for some time; but after the leaving her husband's house it did not appear that she ever saw Mr.

Mr. *Natt*, or lived in a lewd manner. After some time, she sent *Lucas* an attorney to her husband, to desire that he would receive her again; the husband told him, that if she came again, she should never sit at the upper end of his table, nor have the government of the children; but should live in a garret. Then *Lucas* proposed to him, to make her an allowance, and proposed about 80 or 100 l. a year, he being worth about 5 or 600 l. a year. But that was not complied with; and afterwards she came to *London*, and bought the linen to the amount of 53 l. By *Raymond* chief justice: If a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner; the tradesman trusts her at his peril, and the husband is not bound. And this hath been so adjudged in two or three cases. Indeed if he refuse to receive her again, from that time it may be an answer to the elopement. In this case he doth not absolutely refuse to receive her again; but that she should neither sit at his table, nor have any government of the children, but should be kept in a garret; and she deserved no better usage. And the plaintiff was nonsuit. *Str.* 875.

5. By the 13 Ed. 1. st. 1. c. 33. *If a wife willingly leave her husband, and go away, and continue with her* Living with an adulterer.
advouterer, she shall be barred for ever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon; except that her husband willingly, and without coercion of the church, reconcile her and suffer her to dwell with him; in which case, she shall be restored to her action.

Willingly leave her husband, and go away, and continue] Albeit the words of this branch be in the conjunctive, yet if the woman be taken away not willingly but against her will, and afterwards consent, and remain with the adulterer without being reconciled, she shall lose her dower; for the cause of the bar of her dower is not the manner of the going away, but the remaining with the adulterer in avowtry without reconciliation, that is the bar of the dower. 2 *Inst.* 435.

And continue with her advouterer] Albeit she doth not continually remain in avowtry with the adulterer, yet if she be with him and commit adultery it is a tarrying within this statute. 2 *Inst.* 435.

And if she once remain with the adulterer in avowtry, and afterwards he keepeth her against her will; or if the advouterer turneth her away, yet she shall be said to continue with the advouterer within this statute. 2 *Inst.* 435.

Marriage.

To demand her dower] In this case of elopement, and remaining with the adulterer, the wife could not be barred of her dower by the common law, although a divorce were sued or had for the same adultery: but by a divorce *a vinculo*, in the life time of her husband, she loseth her dower by the common law. 1 *Inst.* 33.

M. 12 G. Morris and Martin. Action for meat and other things provided for the defendant's wife. The defendant proved she went away from him with an adulterer. *Raymond* chief justice held, that the husband should not be charged for necessaries for her, though the plaintiff who provided for her had no notice; and he said, chief justice *Holt* always ruled it so. *Str.* 647.

T. 12 G. Mainwaring and Sands. In an action against the husband for a laced head sold to the wife, it was proved, that the wife lived from her husband in adultery, and that she told the plaintiff she had a husband, but that signified nothing, for she would pay him herself. *Raymond* chief justice held the defendant not chargeable, and said he should have ruled it so, if there had been no actual notice, which only strengthened the case. *Str.* 706.

Prohibition.

6. *H. 12 J. Hyat's case.* *Thomas Hyat* prayed a prohibition to the consistory court of London, for that he was sued there by his wife to be separated from him *propter sevitiam*; and sentence was there given against him, that his wife should live from him, and that he should allow her 5s 6d weekly, although the husband offered reconciliation, and desired cohabitation, and proffered caution to use her fitly. But it was denied by the court to grant a prohibition; because the court of the ordinary is the proper court for allowance of alimony, and may take order for separation or divorce, if she be cruelly used. *Cro. Ja.* 364.

Martyrdom of king Charles the first. See
Holidays.

Mast.

MAST is the acorn, nut, or other fruit of the trees of the wood, which is usually fed upon by the swine or other cattle: perhaps from *μασίζω*, to champ or chew;

from whence also may proceed the Saxon word *mæflan*, to fatten. Which is treated under the title *Tithe*.

May the twenty-ninth. See *Holidays*.

Methodists. See *Dissenters*.

Metropolitan. See *Bishops*.

Midwives.

HERETOFORE, in cases of necessity, the office of baptizing was frequently performed by the midwife; and it is very probable, that this gave occasion first to midwives being licensed by the bishop or his delegated officer. *Wals. c. 31. 2 Burnet's Hist. Ref. 77. (f)*

And by several constitutions, the minister was required frequently to instruct the people, in the form of words to be used in such cases of necessity.

In order for the midwife's obtaining a licence, she must be recommended under the hands of matrons, who have experienced her skill; and also of the parish minister, certifying as to her life and conversation, and that she is a member of the church of England.

The oath to be administered to a midwife by the bishop or his chancellor, when she is licensed to exercise that office, is said to have been as followeth:

" You shall swear, first, that you shall be diligent and faithful and ready to help every woman labouring with child, as well the poor as the rich: and that in time of necessity, you shall not forsake the poor woman to go to the rich.

" Item, You shall neither cause nor suffer any woman to name or put any other father to the child, but only him which is the very true father thereof indeed.

" Item, You shall not suffer any woman to pretend, feign, or surmise herself to be delivered of a child, who is not indeed; neither to claim any other woman's child for her own.

(f) See *Baptism, IV.*

Midwives.

“ Item, You shall not suffer any woman's child to be murdered, maimed, or otherwise hurt, as much as you may : and so often as you shall perceive any peril or jeopardy either in the woman, or in the child, in any such wife as you shall be in doubt what shall chance thereof ; you shall thenceforth in due time send for other midwives and expert women in that faculty, and use their advice and counsel in that behalf.

“ Item, You shall not in any wise use or exercise any manner of witchcraft, charm, or forcerv, invocation, or other prayers, than may stand with God's laws and the king's.

“ Item, You shall not give any counsel or minister any herb, medicine, or potion, or any other thing, to any woman being with child, whereby she should destroy, or cast out that she goeth withal before her time.

“ Item, You shall not enforce any woman being with child, by any pain or by any ungodly ways or means, to give you any more for your pains or labour in bringing her to bed, than they would otherwise do.

“ Item, You shall not consent, agree, give or keep counsel, that any woman be delivered secretly of that which she goeth with, but in the presence of two or three lights ready.

“ Item, You shall be secret, and not open any matter appertaining to your office, in the presence of any man ; unless necessity, or great urgent cause do constrain you so to do.

“ Item, If any child be dead born, you yourself shall see it buried in such secret place, as neither hog or dog, nor any other beast may come unto it ; and in such sort done, as it be not found nor perceived, as much as you may : and that you shall not suffer any such child to be cast into the jaques or any other inconvenient place.

“ Item, If you shall know any midwife using or doing any thing contrary to any of the premises, or in any otherwise than shall be seemly or convenient ; you shall forthwith detect, open or shew the same to me or my chancellor for the time being.

“ Item, You shall use yourself in honest behaviour to the woman, being lawfully admitted to the room and office of a midwife, in all things accordingly.

“ Item, That you shall truly present to my self, or my chancellor, all such women as you shall know from time to time to occupy and exercise the room of a wi

“ within my aforefaid diocefe and jurifdiction of ———
 “ without any licence and admiffion.

“ Item, You fhall not make or affign any deputy or
 “ deputies, to exercife or occupy under you in your ab-
 “ fence the office or room of a midwife, but fuch as you
 “ fhall perfectly know to be of right honeft and difcreet
 “ behaviour; and alfo apt, able, and having fufficient
 “ knowledge and experience to exercife the faid room and
 “ office.

“ Item, You fhall not be privy, or consent, that any
 “ prieft or other party fhall in your abfence, or in your
 “ company, or of your knowledge or fufferance, baptize
 “ any child by any mafs, latin fervice, or prayers, than
 “ fuch as are appointed by the laws of the church of Eng-
 “ land; neither fhall you consent, that any child born by
 “ any woman who fhall be delivered by you, fhall be car-
 “ ried away without being baptized in the parifh by
 “ the ordinary minifter where the faid child is born,
 “ unlefs it be in cafe of neceffity baptized privately
 “ according to the book of common prayer: but you
 “ fhall forthwith, upon underftanding thereof, either give
 “ knowledge to me the faid bifhop, or my chancellor for
 “ the time being.

“ All which articles and charge you fhall faithfully ob-
 “ ferve and keep: fo help you God, and by the contents
 “ of this book.” *Book of Oaths.*

If there be a fuit in the fpiritual court, againft a woman
 for exercifing the trade of a midwife without licence of the
 ordinary, againft the canons: a prohibition lieth: for this
 is not any fpiritual function, of which they have cognifance,
 2 *Relfs Abr.* 286.

Mines in the glebe land. See Glebe land.

Monasteries.

NOTE, the principal parts of this title are extracted
 from that moft accurate and valuable work, bifhop
Tanner's Notitia Monastica.

I. *Origin of monasteries:*

II. *The feveral orders of monks.*

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III. *Canons.*

Monasteries.

- III. *Canons.*
- IV. *Nuns.*
- V. *Friars.*
- VI. *Military orders.*
- VII. *Of the several kinds of houses.*
- VIII. *Officers therein.*
- IX. *Dissolution.*
- X. *Observations.*

I. *Origin of monasteries.*

The original of *monks* (from the word *monas*, solus) seemeth to have been this: The persecutions, which attended the first ages of the gospel, forced some christians to retire from the world, and live in desarts and places most private and unfrequented, in hopes to find that peace and comfort among beasts, which were denied them amongst men. And this being the case of some very extraordinary persons, their example gave so much reputation to retirement, that the practice was continued when the reason ceased which first began it. And after the empire became christian, instances of this kind were numerous; and those, whose security had obliged them to live separately and apart, became afterwards united into societies.

And in this kingdom in particular, it is not unlikely, but that several christians, to avoid the heat of persecution, which raged fiercely here in the time of Dioclesian, about the year 303, might withdraw themselves into solitary places. The troublesome times which soon after followed by the Romans hard usage of the Britons, and the invasion of the Scots from I.eland, the Picts and Attacots from the north, and the Saxons and Franks from the east and south, might possibly farther incline contemplative persons to flee into caves, forests, and such like solitudes, and spend their time there in reading the scriptures, and other duties of religion, though under no tie or vow but what they imposed upon themselves.

II. *The several kinds of monks.*

Benedictines.

1. The *Benedictine* monks were those who followed the rule of St. *Benedict*, or *Bennet*; who was born at *Nursia* in the dukedom of *Spoletto* in Italy, about the year 480.
From

From the colour of their outward habit, they were generally called black monks. This order is said to have been brought into England about the year 596. Of this order were all the cathedral priories, except Carlisle; and most of the richest abbeys in England. There were also nuns, as well as monks, of this order.

2. A reformation of some things which seemed too relax in St. Benedict's rule, was begun by Bernon, abbot of Gigni in Burgundy, and increased and perfected by Odo abbot of *Cluni*, about the year 912; which gave occasion to the rise of the *Cluniac* order; which was the first and principal branch of the Benedictines. For they lived under the rule of St. Benedict, and wore a black habit; but observing a different discipline, were called by a different name. Cluniacs.

William earl Warren, son in law to William the conqueror, first brought these monks into England, and built their first house at Lewes in Sussex about the year 1077.

All the monasteries of this order in England were governed by foreigners; and had more French than English monks in them, but many of them were afterwards made denizens; and all of them at last discharged from all subjection to the foreign abbeys.

There were 27 priories and cells of this order in England.

3. The order of *Grandmont* was instituted at *Grandmont* in Limosin in France, about the year 1076, by Stephen, a gentleman of Auvergne. The monks of it lived under the rule of St. Benedict, with some little variation. They were brought into England in the reign of king Henry the first, and seated at Abberbury in Shropshire; besides which it doth not appear that there were more than two other houses of this order in England, viz. Cresswell in Herefordshire, and Grosfont or Eskedale in Yorkshire. Grandmontines.

4. The *Carthusian* monks were also a branch of the Benedictines, whose rule they followed, with the addition of a great many austerities. Their author was one Bruno, born at Cologne in Germany; who first instituted this order at *Chartreux* (*Cartusia*) in the diocese of Grenoble in France, about the year 1080. Carthusians.

Their houses were called *Chartreux* houses, which by corruption have degenerated into *Charter* houses.

Their rule was the most strict of any of the religious orders; for they were never to eat flesh, and were obliged to feed on bread, water, and salt one day in every

week. They wore a hair shirt next their skin, and were allowed to walk only about their own grounds once a week.

They were brought into England about the year 1180 by King Henry the second; and had their first house at Wjtham in Somersetshire.

Their habit was all white, except their outward plained cloak, which was black.

There were but nine houses of monks of this order in England.

Cisterians, or
Benedictines.

5. There was yet another branch of Benedictines called *Cisterians*, from *Cisterium* or *Cisteaux*, in the bishoprick of Chalons in Burgundy, where this order was first instituted by Robert abbot of Molesme, in the year 1098. They were also called *Bernardines* from St. Bernard abbot of Clairvaux about the year 1116, who was a great promoter of this order.

From the colour of their habit, they were called *White monks*.

Their monasteries, which became very numerous in a short time, were generally founded in solitary and uncultivated places; and all dedicated to the blessed virgin.

These monks came into England in the year 1128; had their first house at Waverley in Surry; and before the dissolution had 85 houses here.

Savignians, or
fratres grisei.

6. The order of *Savigni* or *Fratres Grisei*, were founded by Vitalis de Mortain, who began to gather disciples in the forest of *Savigni* in France, about the year 1105. He gave his disciples the rule of St. Benedict, with some peculiar constitutions: and they took a *grey habit*, from whence they were called *fratres grisei*. Vitalis came into England in the year 1120; and preaching here, and converting many, probably introduced his order, which was shortly after (viz. in the year 1148), united to the Cisterians.

Tironenses.

7. The order of *Tiron* was instituted by St. Bernard, who was born in the territory of Abbeville in the year 1046, who set up a sort of monks that took the name of *Tironenses* from their first monastery, which was founded at *Tiron* about the year 1109. They were reformed Benedictines. There seems to have been no house in England of this order, and only one abbey in Wales, viz. St. Dagmael's (where they were placed about the year 1126), with its dependent priory at Pille, and cell at Caldey.

8. The

8. The orders of monks abovementioned, were all that we had in England and Wales, except the *Culdees* or *cultores Dei*; who were Scotch monks, and of the same rule with the Irish ones. We meet with these no where but at St. Peter's in York.

And the institution of Scotch monks there, seemeth to have arisen from the connection which was anciently between the metropolitical see of York and the kingdom of Scotland; for until about the year 1466, the archbishop of York had jurisdiction over all the bishops of Scotland, who had their consecration from him, and swore canonical obedience to him.

III. Canons,

1. Besides the monks, there were also *canons* (from *canon*, regula), which were of two sorts, regular and secular. The secular were so called because they conversed in *seculo*, abroad in the world, performed spiritual offices to the laity, took upon them the care of souls (which the regulars could not do without dispensation), and differed in nothing almost from common priests, save that they were under the government of some local statutes. For though they were in some places confined to live under one roof, as the monks and regular canons did, yet they generally lived apart, and were maintained by distinct prebends, almost in the same manner with the canons and prebendaries of other cathedral and collegiate churches at this day.

2. *Regular* canons were such as lived under some rule. They were a less strict sort of religious than the monks, but lived together under one roof; had a common dormitory and refectory, and were obliged to observe the statutes of their order.

3. The chief rule for these canons is that of *St. Austin*, who was made bishop of Hippo in the year 395. But they were but little known till the tenth or eleventh century; were not brought into England till after the conquest, and seem not to have obtained the name of Austin canons till some years after. The general opinion is, that they came in after the beginning of the reign of king Henry the first, about the year 1105.

Their habit was a long black cassock, with a white surcoat over it, and over that a black cloak and hood; from whence they were called black canons regular of St. Austin,

founder directed that the men should acknowledge the abbess or prioress of the convent as their superior, and submit to her authority both in spirituals and temporals. And the abbess of Fontevrault was made the general superiress and head of the order.—These nuns were brought into England by Robert Bossu earl of Leicester, before the year 1161, and placed at Nun Eaton in Warwickshire; but there were only two houses more of this order in England, and there is no express account of any monk in any of them, but only of a prior at Nun Eaton.

Order of St.
Clare or the
Poor Clares.

3. The nuns of *St. Clare* were founded by her whose name they bear, at Assise in Italy, about the year 1212. These nuns observing St. Francis's rule, and wearing the same coloured habit with the Franciscan friars, were often called *minorites*; and their house without Aldgate, the *minorites*. They were likewise called the *Poor Clares*, probably from their scanty endowments. They were brought into England by Blanch queen of Navarre, who was wife to Edmund earl of Lancaster, Leicester and Derby, about the year 1293, and seated without Aldgate as aforesaid. Besides which, there were but three houses more of this order in England, viz. Waterbeache and Denny in Cambridgeshire, and Brusyard in Suffolk.

Order of St.
Bridget.

4. The *Brigittines*, or nuns of our holy Saviour, were instituted by St. *Bridget*, princess or duchess of Nericia in Sweden, about the middle of the 14th century, under the rule of St. Austin, with some additions of her own. This order, tho' chiefly for women, had likewise men in every convent (who lived in different apartments, and were not permitted to come near the women but in cases of great necessity), and differed from all other institutions in requiring a particular number of men and women in every house, to wit, 60 nuns, 13 priests, 4 deacons, and 8 lay brethren. There seems to have been only one house of this order in England, namely at Sion in Middlesex, founded by king Henry the fifth, about the year 1414.

V. Friars.

The before mentioned were all the sorts of monks, canons, and nuns, which we had in England and Wales: the *friars* (*fratres*, brethren) were these following:

Dominicans.

1. The *Dominicans*; whose founder was St. *Dominic*: a Spaniard, who was born about the year 1070. They were

were called *preaching friers*, from their office to preach and convert hereticks; *black friers*, from their garments; and in France, *Jacobines*, from having their first house in St. James's street at Paris. Their rule was chiefly that of St. Austin. They came into England in the year 1221, had their first house at Oxford, and at the dissolution had about 43 houses in England.—There were nuns also of this order, but not in England.

2. The *Franciscans* received their rule from St. *Francis* Franciscans, an Italian, in the year 1182. They were also called *Grey* or *Minor Friers*, the one from their grey cloathing, the other name they assumed out of pretended humility. They girded themselves with cords, and went barefooted. The general opinion is, that they came into England in the year 1224, and had their first house at Canterbury, and their second at London.—A relaxation having by degrees crept into this order, it was thought fit to reform and reduce it to its first rule and institution. Those that continued under the relaxation were called *Conventuals*; and such as accepted the reformation of their order were called *Observants* or *Recollets*. This reformation was begun by St. *Barnard* or *Bernardin*, about the year 1400.—King Edward the 4th is commonly said to have brought them into England, but there is no certain account of their being here, till king Henry the 7th built two or three houses for them. At the dissolution, the conventual Franciscans had about 55 houses, which were under seven custodies or wardenships; viz. those of London, York, Cambridge, Bristol, Oxford, Newcastle, and Worcester.

3. As to the *Capuchins*, and other distinctions of the *Capuchins,* Franciscans beyond the seas; they chiefly arose since the English reformation, and never had any place here.

4. The *Trinitarians*, *Maturines*, or friers of the order *Trinitarians, or* of the *Holy Trinity*, for the redemption of captives, were *Maturines.* instituted by St. John de *Matba*, and Felix de Valois in France, about the year 1197. The rule was that of St. Austin, with some peculiar constitutions. Their revenues were to be divided into three parts, one for their own support and maintenance, another to relieve the poor, and a third to redeem such christians as should be taken captives by the infidels. They were called *Trinitarians*, because all their churches were to be dedicated to the *Holy Trinity*; and *Maturines*, from having their first house in Paris near St. *Mathurine's* chapel. They were brought into England in the year 1224; where the lands, revenues,

revenues, and privileges of the canons of the holy sepulchre were given to them upon the decay of that order; and had their first house at Mottenden in Kent. There were about 10 or 12 houses of these friars in England and Wales.

Carmelites.

5. The *Carmelite* or *white friars* (the former of which names they had from the place of their first residence, and the latter from the colour of their habit) came next into this kingdom. They were also called brethren or friars of the *blessed virgin*. They pretended to great antiquity, but the first certain account we have of them is at mount *Carmel* in Palestine, about the year 1238. Their rule (which was chiefly that of St. Basil) is said to have been given them by Albert patriarch of Jerusalem about the year 1205. They were brought into England in the year 1240, by the lords John Vesey and Richard Grey, and had their first houses at Alnwick in Northumberland, and Ailesford in Kent. Of this order there were about 40 houses in England and Wales.

**Crossed or
crouched friars.**

6. The order of *Crossed* or *Crouched* friars were instituted, or at least reformed, by one Gerard, prior of St. Mary of Morello at Bologna; and confirmed in the year 1169 by pope Alexander the third, who brought them under St. Austin's rule, and made some other constitutions for their government. At first they carried a *cross* fixed to a staff in their hands, and afterwards had one made of red cloth sewed upon their backs or breasts. They came into England in the year 1224, and had their first house at Colchester. There were not here above 6 or 7 houses of these friars.

**Austins or Ere-
mites.**

7. The origin of the *Austin* friars or friars *Eremites* of the order of St. Austin (from *ερημος* a desert place) is very uncertain. They were brought into England about the year 1250. They had about 32 houses in England and Wales at the suppression.

**Order of the
Sac.**

8. The friars of the *Sac* first appeared in England in the year 1257. The right style of them was *friers of the penance of Jesus Christ*. But they were commonly called friars of the *Sac*, from their habit being either shaped like a *sack*, or made of that coarse cloth called *sackcloth*. They seem to have had their first house near Aldersgate, London. But their order was very short lived here, being put down by the council at Lyons in the year 1307.

Bethl mites.

9. The *Bethlemite* friars, came in also in the year 1257. They had their rule and habit much like that of the Dominicans, but were distinguished from them by a red star
of

of five rays, with a blue circle in the middle of it, worn on their breasts in memory of the star which appeared to the wise men, and conducted them to *Bethlehem*. They were placed in Trumpington street at Cambridge the first year they came over. And that seems to have been the only house of these friers in England.

10. The order of *St. Anthony of Vienna* was instituted in the year 1095, for the help and relief of such persons as were afflicted with that painful inflammation called *St. Anthony's fire*, from that saint's being thought to ease people under it, and deliver them from it. The friers or brethren of this order followed *St. Austin's* rule; came hither early in the reign of king Henry the third, and had one house at London, and another at Hereford.

11. The last order of friers which was brought into this kingdom, was that of *Bonhommes*, or *good men*: who were brought hither by Edmund earl of Cornwall, in the year 1283, and placed at Atherug in Bucks. Besides which, there was but one house more of this order in England, to wit, Edington in Wiltshire. These friers followed the rule of *St. Austin*, and wore a blue habit.

VI. Military orders.

Of the *military* orders of the religious, there were these following:

1. *Knights Hospitallars*, who took their name from an hospital built at Jerusalem for the use of pilgrims coming to the holy land, and dedicated to *St. John Baptist*. For the first business of these knights was, to provide for such pilgrims at that hospital, and to protect them from injuries and insults upon the road. They were instituted about the year 1092. They followed chiefly *St. Austin's* rule: and wore a black habit, with a white cross upon it. They soon after came into England, and had an house built for them in London in the year 1100. And from a poor and mean beginning, they obtained so great wealth and honours and exemptions; that their superior here in England was the first lay baron, and had a seat amongst the lords in parliament; and some of their privileges were extended even to their tenants. They were at first called knights of *St. John of Jerusalem*; but settling chiefly at Rhodes after they were driven out of the holy land, were afterwards called knights of Rhodes; and after the loss of Rhodes in the year 1522, and their having the island of Malta given them

them by the emperor Charles the fifth, they were called knights of Malta.

There were also sisters of this order; but we had only one house of them in England, viz. Buckland in Somersetshire.

Templars.

2. The *knights Templars* were instituted in the year 1118; and were so called from having their first residence in some rooms adjoining to the *temple* at Jerusalem. Their business also was, to guard the roads for the security of pilgrims in the holy land; and their rule, that of canons regular of St. Austin. Their habit was white, with a red cross on the left shoulder. Their coming to England was probably pretty early in the reign of king Stephen: and their first seat was in Holborn. They increased very fast, and in a little time obtained very large possessions. But in less than 200 years, their wealth and power was thought too great; they were accused of horrid crimes, and thereupon every where imprisoned; their estates were seized; and their order was suppressed by pope Clement the fifth, in a general council at Vienna, in the year 1312. (1)

Order of St. Lazarus.

3. The order of *St. Lazarus* of Jerusalem (of which we had a few houses) seems to have been founded for the relief and support of lepers and impotent persons of the military orders.

VII. *Of the several kinds of houses.*

The above recited are all the religious orders which we had in England and Wales. The houses belonging to the said orders were as follows:

Cathedrals.

1. *Cathedral* is a name yet well known: in the conventual cathedrals, the bishop was in the place of an abbat, and had the principal stall on the right hand of the entrance into the quire; as he hath still at Ely, and till lately had at Durham and Carlisle.

Colleges.

2. *Collegiate* churches and colleges consisted of a number of secular canons, living together under the government of a dean, warden, provost, or master; and having for the more solemn performance of divine service,

(1) For the gallant character of these knights, and the base arts by which they fell a sacrifice to the order of St. John, in the reign of Ed. II. see *Hume's History of England*, vol. 2. p. 361, &c.

chaplains,

Monasteries.

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chaplains, singing men, and choristers belonging to them.

3. An *abbey* was a society of religious people, having an *Abbat*. abbat or abbess to preside over them. And some of these were so considerable, that the abbats of them were called to parliament, and had seats and votes in the house of lords. Mr. Fuller saith, that in the 49 Hen. 3. sixty-four abbats, and 36 priors were called to parliament. But this number being too great, king Edward the first reduced it to 25 abbats and 2 priors, to whom were afterwards added two abbats. So that there were 29 in all, and no more, that stately and constantly enjoyed this privilege; viz. the abbat of Tewkesbury, the prior of Coventry, the abbats of Waltham, Cirencester, St. John's at Colchester, Croiland, Shrewsbury, Selby, Bardney, St. Bennet's of Hulme, Thorney, Hide, Winchelcomb, Battel, Reading, St. Mary's in York, Ramsey, Peterburgh, St. Peter's in Gloucester, Glastonbury, St. Edmond's Bury, St. Austlin's in Canterbury, St. Alban's, Westminster, Abingdon, Evesham, Malmesbury, and Tavistock; and the prior of St. John's of Jerusalem, who was stiled the first baron of England, but it was with respect to the lay barons only, for he was the last of the spiritual ones.

4. A *priory* was a society of religious, where the chief *Prior*, person was termed a prior or prioress; and of these were two sorts:

(1) Where the prior was chief governor, as fully as any abbat in his abbey, and was chosen by the convent: such were the cathedral priors, and most of the Austin order.

(2) Where the priory was a cell, subordinate to some great abbey; and the prior was placed and displaced at the will of the abbat. But there was a considerable difference between some of these cells. For some were altogether subject to their respective abbies, who sent them what officers and monks they pleased, and took their revenues into the common stock of the abbies. But others consisted of a stated number of monks who had a prior sent them from the abbey, and paid a pension yearly as an acknowledgment of their subjection, but acted in other matters as an independent body, and had the rest of the revenues for their own use. These priories or cells were always of the same order with the abbies on whom they depended, though sometimes of a different sex; it being usual after the conquest, for the great abbies to build nunneries in some of their

their manors, which should be priories to them, and subject to their visitation.

There were also *priories alien*, which were cells to foreign monasteries. For when manors or tithes were given to foreign monasteries, the monks, either to increase their own rule, or perhaps rather to have faithful stewards of their revenues, built convenient houses for the reception of a small convent, and then sent over such a number as they thought proper, constituting priors over them. And there was the same difference in these cells as in the former, for some of them were conventual, and had priors of their own choosing; and these were intire societies within themselves, and received the revenues belonging to their several houses for their own use and benefit, paying only the ancient apport (*apportum*, perhaps from *porto*, to carry), or what was at first the surplusage, to the foreign house. But others depended wholly upon the foreign houses, their priors were set over them by the foreign houses, their monks also were often foreigners; and both of them removable at pleasure; and they returned all their revenues to the foreign head houses. For which reason their estates were generally seized during the wars between England and France, and restored to them again upon a return of peace.

These alien priories were most of them made by such as had foreign abbies founded by themselves or by some of their family.

Preceptories.

5. *Preceptories* were manors or estates of the knights templars, where erecting churches for the service of God, and convenient houses, they placed some of their fraternity under the government of one of those more eminent templars, who had been by the grand master created *præceptores templi*, to take care of the lands and rents in that place and neighbourhood, and so were only cells to the principal house at London.

Commandries.

6. *Commandries* were the same amongst the knights hospitalars, as preceptories were amongst the templars, viz. societies of those knights placed upon some of their estates in the country, under the government of a *commander*; who were allowed proper maintenance out of the revenues under their care, and accounted for the remainder to the grand prior at London.

Hospitals.

7. *Hospitals* were such houses for relief of the poor and infirm people, as were incorporated by royal patents, capable of gifts and grants in succession. But as they were blind and impotent, there generally were in

Monasteries.

these hospitals, two or three religious; one to be master or prior, and one or two be chaplains and confessors; and these observed the rule of St. Austin, and probably subjected the poor and impotent to some religious restraints, as well as to the local statutes. Hospitals were originally designed for the relief and entertainment of travellers upon the road, and particularly of pilgrims, and therefore were generally built by the way side; but of later years they have been always founded for fixed inhabitants.

8. *Frieries* were houses erected for the habitation of *Friars*; they were very seldom endowed, yet many of them were large and stately buildings, and had noble churches, in which many great persons chose to be buried. Friars were by their profession mendicants, and to have no property; but most of their houses had some shops and gardens belonging to them.

9. *Hermitages* (from *spuas*, a desert or solitary place) *Hermitages* were religious cells erected in private and solitary places, for single persons or communities, many times endowed, and sometimes annexed to larger religious houses.

10. *Chantries* (*cantariæ*) were endowments of lands *Chantries*, or other revenues, for the maintenance of one or more priests to celebrate daily mass for the souls of the founder and his relations, and of their other benefactors; sometimes at a particular altar, and oftentimes in little chapels added to cathedral and parochial churches for that purpose.

11. *Free chapels* were places of religious worship, exempt *Free chapels* from all jurisdiction of the ordinary, save only, that the incumbents were generally instituted by the bishop, and inducted by the archdeacon of the place. Most of these chapels were built upon the manors and ancient demesnes of the crown, whilst in the king's hands, for the use of himself and retinue when he came to reside there. And when the crown parted with those estates, the chapels went along with them, and retained their first freedom; but some lords having had free chapels in manors that do not appear to have been ancient demesne of the crown, such are thought to have been built and privileged by grants from the crown.

VIII. Officers therein.

are in these houses respectively, which we read of,

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1. In

Monasteries.

Abbat.

1. In every abby the chief officer was the *abbat* or *abbes*, who presided in great pomp, was generally called lord abbat or lady abbess, and had a kitchen, and other offices distinct from the common ones of the society.

Prior.

2. In every priory, the chief officer was the *prior* or *priores*, who had the same power in priories as abbats and abbesses had in abbies, but lived in a less splendid and expensive manner, though in some of the greater houses they were called lord prior, and lady prioress.

Subabbat and
subprior.

3. Next under the abbat in every abby was the prior, who in the abbat's absence had the chief care of the house, and under him was the subprior, and in great abbies the third, fourth, and even fifth prior, who had their respective shares in the government of the house, and were removable at the will of the abbat, as all the other obedientiarii or officers were.

Also in every priory, next under the prior was the subprior, who assisted the prior whilst present, and acted in his stead when absent.

Magister operis.

4. *Magister operis*, master of the fabrick ; who probably looked after the buildings, and took care to keep them in good repair.

Elemosynarius.

5. *Elemosynarius*, the almoner, who had the oversight of the alms of the house (which were every day distributed at the gate to the poor), who divided the alms upon the founder's day, and at other obits and anniversaries, and in some places provided for the maintenance and education of the choiristers.

Pitantiarius.

6. *Pitantiarius*, who had the care of the *pitancies* ; which were allowances (*pittances*) upon particular occasions over and above the common provisions.

Sacrista.

7. *Sacrista*, the sexton, who took care of the vessels, books, and vestments belonging to the church ; looked after and accounted for the oblations at the great altar, and other altars and images in the church, and such legacies as were given either to the fabrick or utensils. He likewise provided bread and wine for the sacrament : and took care of burying the dead.

Camerarius.

8. *Camerarius*, the chamberlain, who had the chief care of the dormitory, and provided beds and bedding for the monks, razors and towels for shaving them, and part of (if not all) their cloathing.

Cellerarius.

9. *Cellerarius*, the cellarer, who was to procure provisions for the monks and all strangers resorting to the convent ; viz. all sorts of flesh, fish, fowl, wine, bread, corn, malt, meal, salt, and the like : as likewise wood for firing, and all utensils for the kitchen.

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10. *Treasurarius*, the burſar, who received all the common rents and revenues of the monastery, and paid all the common expences. 529

11. *Precentor*, the chaunter, who had the chief care of the choir ſervice, and not only preſided over the ſinging men, organiſt, and choiriſters, but provided books for them, paid them their ſalaries, and repaired the organs. He had alſo the cuſtody of the ſeal, and kept the *liber diurnal* or chapter book, and provided parchment and ink for the writers, and colours for the limners of books for the library.

12. *Hofpilarius*, or *hospitarius*, whoſe buſineſs it was to ſee ſtrangers well entertained; and to provide firing, napkins, towels, and ſuch like neceſſaries for them.

13. *Infirmarius*, who had the care of the infirmary, and of the ſick monks who were carried thither, and was to provide them phyſick and all neceſſaries, and when they died was to waſh and prepare their bodies for burial.

14. *Reſectonarius*, who looked after the hall, providing table cloths, napkins, towels, diſhes, plates, ſpoons, and other neceſſaries for it, and ſervants alſo to wait and tend there. He had likewiſe the keeping of the cups, ſalts, ewers, and all the ſilver utenſils whatſoever belonging to the houſe, except the church plate.

15. *Coquinarius*, the cook, who preſided in the kitchen for the dreſſing of victuals. Coquinarius.

16. *Gardinarius*, the gardiner. Gardinarius.

17. *Portarius*, who ſeemeth to have taken care of the carriages, and ſuch like; for that he was not the janitor or porter, ſeemeth probable, for that divers have been promoted to be abbats from that office. Portarius.

18. In every great abby there was a large room called the ſcriptorium, where ſeveral writers made it their buſineſs to tranſcribe the miſſals, liegers, and other books for the uſe of the houſe, and more eſpecially to tranſcribe books for the uſe of the library. And ſo zealous were the monks in general to replenish their libraries, that they often procured lands to be given, and churches to be appropriated for that work. Writers.

19. In all the great abbies, there were alſo perſons appointed to take notice of the principal occurrences of the kingdom, and at the end of every year to digeſt them into *annals*. In theſe records they particularly preſerved the memories of their founders and benefactors; the years and days of their births and deaths, their marriages, children, and ſucceſſors: ſo that recourſe was ſometimes

had to them, for proving persons ages and genealogies; though it is to be feared, that some of those pedigrees were drawn up from tradition only: and that in most of their accounts they were favourable to their friends, and severe upon their enemies.

The canons also and constitutions of the clergy in their national and provincial synods, and even acts of parliament, were sent to the abbies to be recorded.

IX. *Dissolution.*

Templars dissolved.

1. The Templars (as was before observed) for many and great abuses charged upon them, were suppressed so early as the year 1312.

And in the year 1323 their lands, churches, advowsons, and liberties here in England, were given by the act of parliament of the 17 *Ed. 2. §. 3.* to the prior and brethren of the hospital of St. John of Jerusalem.

Other dissolutions before the 27 H. 8.

2. About the year 1390, William of Wickham, bishop of Winchester, by the leave of the then pope and king, bought the alien priories of Hornchurch and Writtle in Essex, and settled them on his new college at Oxford. And after the suppression of alien priories, Takeley in Essex and Hamle in Hampshire were settled upon this college. And Andover was settled upon his college at Winchester.

About the year 1437, archbishop Chicheley founded All Souls college in Oxford, and got the revenues of several ancient priories to be settled thereon.

About the year 1441, king Henry the sixth founded the college at Eaton, and King's college in Cambridge: and endowed them chiefly with alien priories.

About the year 1459, William Wainfleet bishop of Winchester founded Magdalen college in Oxford, and got the priory of Sele or Attefele in Suffex, and the priory of Seleburne in Hampshire, settled on it. The hospitals also of Aynho and Brakeley in Northamptonshire were united to this college in the year 1484.

In the year 1497, John Alcock bishop of Ely, with the king's consent, suppressed St. Rhadegund's nunnery in Cambridgeshire, and with the revenues thereof founded Jesus college there.

In the year 1505, Margaret countess of Richmond and Derby, founded Christ's college in Cambridge, and obtained the pope's licence to suppress the abbey of Croyke
in

in Norfolk, and to settle the revenues of it upon that college.

About the year 1508, the same countess began to convert an ancient hospital or priory dedicated to St. John the evangelist at Cambridge into St. John's college, and her executors carried on the design. Bishop Fisher was one of them, and at his desire the nunneries of Heyham in Kent and Broomhalle in Berkshire, and an hospital of regulars at Osprick were suppressed, and the revenues of them settled upon this college.

In the year 1515, Brazen Nose college in Oxford was founded, and William Smith bishop of Lincoln bought the priory of Cold Norton in Oxfordshire of the abbat and convent of Westminster, and gave the lands belonging to it to this new foundation.

Not long after cardinal Wolsey, by licence of the king and of the pope, obtained a dissolution of above 30 religious houses (most of them very small), for the founding and endowing his colleges at Oxford and Ipswich.

About the same time, a bull was granted by the same pope to cardinal Wolsey to suppress monasteries, where there were not above six monks, to the value of 8000 ducats a year, for endowing Windsor, and King's college in Cambridge: and two other bulls were granted to the cardinals Wolsey and Campeius, where there were less than twelve monks, and to annex them to the greater monasteries: and another bull to the same cardinals to inquire about abbies, to be suppressed in order to be made cathedrals: although nothing appears to have been done in pursuance of these bulls.

And afterwards another bull was granted to the same two cardinals, with further powers relating to the new cathedrals; for some of the dioceses were thought too large, and wanted much (as it was said) to be reduced, that the bishops might the better discharge their offices.

But the promoting of learning seems to have been the chief intent of cardinal Wolsey, and of most others, in suppressing these houses: though probably some persons both then and afterwards, promoted it with other views. Archbishop Cranmer particularly is said to have been much for it, because he could not carry on the reformation without it. And as the increase of learning had rendered the corruptions of the church of Rome more visible; many others might also be against these houses, as nurseries of popish superstition: but other things concurred to bring

on their ruin. For, 1. Many of the religious were certainly loose and vicious; though probably not so bad as the visitors represented; for those that are to be run down, will always be set in the worst light; and the preamble to the first act of dissolution did set forth, that in the larger monasteries religion was well observed. 2. The casting off the pope's supremacy was urged for casting off the monks, who notwithstanding their subscriptions were generally thought to be against it in their hearts, and ready to join with any foreign power that should invade the nation; whilst the king was excommunicated by the pope. 3. Their revenues being not employed according to the intent and design of the donors, was also alledged against them. 4. The discovery of many cheats in images, of many feigned miracles, and of counterfeit relicks, brought the monks every where in disgrace, and contributed towards their overthrow. 5. Perhaps the observant friars being so much against the king's divorce from queen Catherine, might exasperate him against all monks and friars in general. But, 6. Not unlikely the great cause might be the king's want of a large supply, and the people's willingness to save their money; although it was certainly hastened by the account which the visitors gave of them. For after some debate in council how to proceed with these houses, the king appointed commissioners to visit them, and they made such a bad report, that when a motion was shortly after made in parliament, that in order to support the king's state and supply his wants, all the religious houses might be conferred upon the crown which were not able to spend above 200l. a year, it met with but little opposition in either house, and an act was passed for that purpose as followeth (a):

Dissolution by
the 27 H. 8.

3. *Forasmuch as manifest sin, vicious carnal and abominable living, is daily used and committed commonly in such little and small abbeys, priories, and other religious houses of monks ca-*

(a) The plausible projects, as lord Coke calls them, which the king urged to the houses of parliament, were, that with the possessions of the monasteries he should be able to maintain 40,000 well-trained soldiers, with skilful captains and commanders, without ever after charging the subjects with subsidies, loans, or aids: Luckily, however, for the liberty of the subject, these projects of a standing army and a fixed revenue, were disappointed by the prodigality of the prince. See *Hume's Hist. of Eng. vol. iv. p. 182. and 4 Inst. p. 44.*

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nons and nuns, where the congregation of such religious persons is under the number of 12 persons; whereby the governors of such religious houses, and their convent, spoil consume and utterly waste as well their churches, monasteries, priories, principal houses, farms, granges, lands, tenements, and hereditaments, as the ornaments of their churches, and their goods and chattels, to the high displeasure of almighty God, slander of good religion, and to the great infamy of the king's highness and the realm, if redress should not be had thereof: And albeit that many continual visitations have been heretofore had by the space of 200 years and more, for an honest and charitable reformation of such unthrifty carnal and abominable living, yet nevertheless little or no amendment is hitherto had, but their vicious living shamelessly increaseth, and by a cursed custom is so rooted and infected, that a great multitude of the religious persons in such small houses do rather chuse to rove abroad in apostacy, than to conform themselves to the observance of good religion; so that without such small houses be utterly suppressed, and the religious persons therein committed to great and honourable monasteries of religion in this realm, where they may be compelled to live religiously, for reformation of their lives, the same else be no redress nor reformation in that behalf: In consideration whereof, the king's most royal majesty, being supreme head on earth under God of the church of England, daily studying and devising the increase advancement and exaltation of true doctrine and virtue in the said church, and the extirpating and destruction of vice and sin, having knowledge that the premises be true, as well by the accounts of his late visitations, as by sundry credible informations, considering also that divers and great solemn monasteries of this realm, wherein (thanks to God) religion is right well kept and observed, be destitute of such full number of religious persons, as they ought and may keep, both thought good that a plain declaration should be made of the premises, as well to the lords spiritual and temporal as to other his loving subjects the commons in this present parliament assembled: Whereupon the said lords and commons, by a great deliberation, finally be resolved, that it is and shall be much more to the pleasure of almighty God, and for the honour of this his realm, that the possessions of such small religious houses now being spent spoiled and wasted for increase and maintenance of sin, should be committed to better uses, and the unthrifty religious persons so spending the same be compelled to reform their lives: Thereupon it is enacted, that his majesty shall have and enjoy to him and his heirs for ever, all such monasteries, priories, and other religious houses of monks canons and nuns, of what kind of habits rules or order soever they be, which have not in lands,

Monasteries.

tenements, rents, tithes, portions, and other hereditaments, above the clear yearly value of 200 l.; and also all such as within one year next before have been surrendered to the king, or otherwise dissolved. 27 H. 8. c. 28.

By this act about 380 houses were dissolved, and a revenue of 30 or 32,000 l. a year came to the crown; besides about 100,000 l. in plate and jewels. Some say, that 10,000 persons were hereby sent to seek their fortunes in the wide world, without any other allowance than 40 s. and a new gown to some few of them. Others say, that such of the religious as desired to continue their profession, were (according to the aforesaid act) allowed to go into the greater monasteries; and such as chose to go into the world, being priests, had every one the abovementioned allowance, and some of them (for their readiness to surrender) got small pensions for life.

The suppression of these houses occasioned great discontent, fomented probably by the secular as well as regular clergy, which at length broke out in open rebellion. But the rebellion being appeased, the king resolved to suppress the rest of the monasteries, and thereupon appointed a new visitation, requiring the visitors to examine every thing that related either to the conversation of the religious, or their affection to the king and the supremacy, or to their cheats impostures or superstitions, or how they were affected during the late commotions. This caused the greater abbeys to be surrendered apace. For some of the religious having been faulty in the late rebellion, were liable to the king's displeasure, and surrendered their houses to save their lives. Some began to like the reformation, and were upon that account easily persuaded to it. Others, seeing their dissolution approaching, had so much embezzled their revenues, that they were scarce able to keep up their houses. A great many monks were executed for having been in the rebellion; and no doubt but many were prevailed upon by the visitors, who endeavoured both by threats and promises to get their resignations. And in the end by the act of the 31 H. 8. c. 13. it was enacted as followeth.

Dissolutions by
the 31 H. 8.

4. *All monasteries, abbaties, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, which have been surrendered or given up since the fourth day of February, in the twenty seventh year of his majesty's reign, and which hereafter shall be surrendered or given up, shall be vested in the king.* (With a clause respecting privileges and exemptions, which was not in the former

mer act; to wit, that such of them as were discharged from payment of tithes, should continue so; and such as were exempted from the visitation of the ordinary, should become visitable by the ordinary or by such persons as the king shall appoint.) 31 H. 8. c. 13.

By this act no houses were suppressed; but all the surrenders, which either were made or should be made, were confirmed. The mitred or parliamentary abbeys, were all in being, and most of the abbats present at the passing of it; and yet none of them either opposed it, or voted against it; but were every one shortly brought to surrender, except the abbats of Colchester, Glastonbury, and Reading, who were therefore accused of high treason, attainted and executed; and their abbeys were seized as forfeited to the king by their attainder.

5. The next year a bill was brought in and passed, ^{Dissolution by} for suppressing the knights of St. John of Jerusalem; by ^{the 32 H. 8.} which it is enacted as followeth; *The lords spiritual and temporal and commons in this present parliament assembled, having credible knowledge, that divers and sundry the king's subjects, called the knights of Rhodes, otherwise called knights of St. John's, otherwise called friars of the religion of St. John of Jerusalem in England, and of a like house being in Ireland, abiding in parts beyond the sea, and having yearly great sums of money out of this realm and out of Ireland, and other the king's dominions, have unnaturally and contrary to their allegiance sustained and maintained the usurped authority of the bishop of Rome; and considering also, that the isle of Rhodes, wherby the said religion took their name and foundation, is surprized by the Turk; and that it were much better that the possessions of this realm, and in other the king's dominions, appertaining to the said religion, should rather be employed and spent within the same, for the defence and safety thereof, than converted to and amongst such unnatural subjects; it is therefore enacted, that the corporation of the said religion in these realms, by whatsoever name or names they be founded incorporated or known, shall be utterly dissolved, and void to all intents and purposes.* 32 H. 8. c. 24. s. 1.

And the king, his heirs and successors, shall have and enjoy all that hospital, mansion house, churches and all other houses, edifices, buildings, and gardens to the same belonging, being near to the city of London, in the county of Middlesex, called the house of St. John of Jerusalem in England; and also all that hospital, church, and house of Kilmainam in Ireland; and all castles, honours, manors, messes, lands, tenements, rents, reversions, services, woods, meadows, pastures, parks, warrins,

warrens, liberties, franchises, privileges, personages, titles, pensions, portions, knights fees, advowsons, commendaries, prebendaries, contributions, responsions, rents, tithes, entries, conditions, covenants, and all other possessions and hereditaments, which appertained to the said religion, or to the priors, masters or governors, knights or other ministers, possessed of and in the same, by the pretence or in the right of the said religion. §. 4.

And all privileges of sanctuary, heretofore used or claimed in mansion houses and other places, commonly called St. John's hold, and all other sanctuaries belonging to any of the said hospitals, shall be utterly void and of none effect. §. 12.

By the suppression of these greater houses by the two last recited acts, the king obtained a revenue of above 100,000 l. a year, besides a large sum in plate and jewels. But the religious of these houses had almost all of them something given for their present subsistence, and pensions assigned them for life or until they should be preferred to some dignity or cure of greater value than their pensions.

Dissolution by
the 37 H. 8.

6. The last act of dissolution that was in this king's reign, was the act of 37 H. 8. c. 4. for dissolving colleges, free chapels, chantries, and the rest, as followeth: *All colleges, free chapels, chantries, hospitals, fraternities, brotherhoods, guilds, and stipendiary priests, having continuance in perpetuity, and being charged or chargeable to the payment of first fruits and tenths, which have been already surrendered, or alienated by covin, or otherwise dissolved, shall be adjudged and deemed in the actual possession of the king, his heirs and successors; and also all and singular such and so many as the king by his commission shall appoint, of the chantries, free chapels, hospitals, colleges, and other the said promotions, now in being, together with all their possessions and revenues, charged or chargeable to the payment of first fruits and tenths; and all colleges chargeable or not chargeable to the said payment of first fruits and tenths; which have lands and other possessions appointed by the donors, for alms to poor people and other charitable deeds to be done.*

This act was made so general, that even those great nurseries of learning, the colleges at Oxford and Cambridge, with those of Winchester and Eaton, were included. And upon the breaking up of the parliament, notice was sent to both the universities, that their colleges were at the king's disposal. This put them upon petitioning for mercy, which was soon obtained, and letters of thanks were sent for the continuance of them.

But the commissioners appointed by this act for giving the king possession of the aforesaid houses and places, did
not

not enter upon many of them before his death, which happened in the January following.

7. And therefore in the beginning of the reign of king *Dissolution by* Edward the sixth, another act passed, viz. the 1 Ed. 6. the 2 Ed. 6. c. 14. as followeth: *All manner of colleges, free chapels, and chantries, which were not in the actual possession of the late king nor of the king that now is; and all manors, lands, tenements, rents, tithes, pensions, portions, and other hereditaments and things, given for the finding of any priest, anniversary, obit, lamp, light, or other like thing in any church or chapel;—shall be vested in the king, his heirs and successors.*

Provided, that where any fraternity, or priest or incumbent of any chantry, by the first institution thereof ought to have kept a grammar school or a preacher; the king's commissioners shall appoint lands and other hereditaments of such fraternity or chantry, to continue in succession to a schoolmaster or preacher for ever: They shall also have power to make and ordain a vicar, to have perpetuity, in every parish church being a college free chapel or chantry, or annexed thereto, that shall come to the king's hands by virtue of this act, and to endow every such vicar sufficiently, having respect to his cure and charge; and also to assign in perpetuity, in every great town and parish, where they shall think necessary to have more priests than one for the ministering the sacraments in such town or parish, lands and tenements belonging to any chantry chapel or stipendiary priest, being within the same town or parish.

Also, where any profit or benefit hath been payable to any poor persons, out of any college, free chapel, or chantry, and other the premises by this act given to the king; the commissioners shall assign lands and other hereditaments, parcel of the premises, for the maintenance and continuance of the same for ever.

And they shall also have power to appoint lands and other hereditaments, parcel of the premises, towards the maintenance of piers, jutties, walls, or banks, against the rage of the sea, havens and creeks.

*Provided also, that nothing herein shall extend to any college, hostel, or hall within either of the universities of Cambridge and Oxford, nor to any chantry founded within the same (yet so, that the king at any time during his life may alter the names of any of the said chantries, and the foundations thereof, within the said universities); nor to the free chapel of St. George in the castle of Windsor; nor to the college called St. Mary's college of Winchester, nigh Winchester, of the foundation of bishop Wickham; nor to the college of Eaton; nor to the parish church commonly called the chapel of the Jew in
Newton,*

Newton, within the isle of Ely, in the county of Cambridge; nor to any chapel made for the ease of the people dwelling distant from the parish church, or such like chapel whereunto no more lands or tenements than the churchyard or a little house or close doth pertain; nor to any cathedral church or college where a bishop's see is, nor to the manors lands tenements or other hereditaments thereof (other than to chantries, obits, lights, and lamps within the same).

Provided also, that the king may give authority to his commissioners, to alter the nature and condition of all manner of obits, as well within the said universities, as in any other place not being suppressed; and the same obits so altered, to dispose to a better use, as to the relief of some poor men being students or otherwise.

Provided also, that this act shall not give any copyhold lands to the king.

By this act were suppressed 90 colleges, 110 hospitals, and 2374 chantries and free chapels.

X. Observations.

Number of
houses suppressed.

1. The number of houses and places suppressed from first to last, so far as any calculations appear to have been made, seemeth to be as follows:

Of lesser monasteries whereof we have the valuation	—	—	—	—	—	374
Of greater monasteries	—	—	—	—	—	186
Belonging to the hospitallers	—	—	—	—	—	48
Colleges	—	—	—	—	—	90
Hospitals	—	—	—	—	—	110
Chantries and free chapels	—	—	—	—	—	2374
Total						3182

Besides the friers houses, and those suppressed by Wolsey, and many small houses of which we have no particular account.

Value.

2. Sir William Temple, in his introduction to english history, p. 175. says, that William the conqueror found above a third part of the lands of the kingdom in the possession of the clergy: and Sir Robert Atkins in his Gloucestershire, p. 11. says, that 28,000 knights fees belonged then to the clergy, out of 60,000 in the whole: but both of them seem to speak of the revenues of the clergy in general, viz. seculars as well as regulars; and do

do not say, what proportion the one bore to the other, no mention how much was shortly after taken from them by the conqueror.

Archbishop Wake, in his state of the church, p. 312, 319, takes notice, that in the year 1380, which was the 4th year of king Richard the second, the commons made an offer in parliament, that if the clergy would bear a third part of the charge, they would grant to the king 100,000 l. in the way of a poll tax; so that the laity should pay 100,000 marks, and the clergy who occupied a third part of the kingdom 50,000. To this the clergy replied, that their grant was not ever made in parliament, nor ought to be; that the laity neither ought, nor could constrain the clergy, nor the clergy them; that therefore the commons should be charged to do their part, and they might be sure the clergy would not be wanting in theirs. But he observes withal, that the clergy usually granted in this proportion.

In the 27th year of king Hen. 8. the revenues of the clergy were laid at a fourth part only of the revenues of the kingdom. And Mr. Collier, in his ecclesiastical history, V. 2. p. 108. says, the revenues of the monks did never exceed the proportion of a fifth part; and considering the leases they granted to laymen upon small rents and easy fines, he thinks their revenues did not exceed a tenth part of the kingdom.

Particularly, the sum total of the clear yearly revenue of the several houses at the time of their dissolution, of which we have any account, seemeth to have been as follows:

	l.	s.	d.
Of the greater monasteries —	104,919	13	3½
Of all those of the lesser monasteries of which we have the valuation — — —	29,702	1	10½
Knights hospitallers head house in London — — —	2,385	12	8
We have the valuation of only 28 of their houses in the country — — —	3,026	9	5
Friers houses of which we have the valuation — — —	751	2	0½
Total	140,785	6	3½

And if we consider, that there were many of the lesser monasteries and houses of the hospitallers and friers, of which

which no computation hath been found; and that not one of the colleges, hospitals, and great number of chantries and free chapels are reckoned in this estimate; and consider withal, the vast quantity of plate and other goods which came into the hands of the king by the dissolution: and the value of money at that time, which was at least six times so much as it is at present; and also that the estimate of the lands was generally supposed to be much under the real worth: we must needs conclude their whole revenues to have been immense.

Number of persons.

3. It doth not appear that any computation hath been made, of the number of persons contained in the religious houses. Those of the lesser monasteries, dissolved by the statute of 27 H. 8. were reckoned at about — 10,000

If we suppose the colleges and hospitals to have contained a proportionable number, these will make about — — — 5347

If we reckon the number in the greater monasteries according to the proportion of their revenues, they will be about 35,000; but as probably they had larger allowances in proportion to their number, than those of the lesser monasteries, if we abate 5000 upon that account, they will then be — 30,000

One for each chantry and free chapel — 2374

Total 47,721

But as there were probably more than one person to officiate in several of the free chapels, and there were other houses which are not included within this calculation; perhaps they may be computed in one general estimate at about 50,000.

How the revenues were disposed of.

4. As there were pensions paid to almost all those of the greater monasteries, the king did not immediately come into the full enjoyment of their whole revenues. However out of what did come to him, he founded six new bishopricks, namely, those of Westminster, (which was changed by queen Elizabeth into a deanry with 12 prebends, and a school), Peterborough, Chester, Gloucester, Bristol, and Oxford. And in eight other sees, he founded deanries and chapters, by turning the priors and monks into deans and prebendaries, to wit, Canterbury, Winchester, Durham, Worcester, Rochester, Norwich, Ely, and Carlisle. He founded also the colleges of Christ Church in Oxford, and Trinity in Cambridge, and finished

finished King's college chapel there. He likewise founded professorships of divinity, law, physick, and of the hebrew and greek tongues, in both the said universities. He gave the house of Grey friers, and St. Bartholomew's hospital, to the city of London; and a perpetual pension to the poor knights at Windsor; and laid out great sums in building and fortifying many ports in the channel, and intended to have done more, but whether out of policy, to give content to the nobility and gentry by selling these lands at low rates, or out of easiness to his courtiers, or an unmeasured lavishness in his expences, he soon disabled himself from it, and nothing further was done by him.

5. (*) Upon the whole, it is observable, that the dissolution of these houses was an act not of the church, but of the

(*) However much abused the monastick institution appears to have been in later times, by crafty and licentious men (and we must allow it to have been sufficiently complained of), it was, at first, calculated to afford a religious asylum to those who wished to cultivate the three virtues, which it chiefly recommended, namely, continence, poverty, and silence. In the earliest ages we find *hermits*, of a solitary disposition of mind, secluding themselves from society, and dwelling in cells remote from human intercourse. Of these it has been said that they were either beasts or gods, that is, that they are either more or less than men. But the monks professed very different principles; to their fraternity the virtues of hospitality and charity were essential duties; they cultivated the arts and sciences useful to mankind; and their seclusion from the world was intended only to preserve their virtue.

To persons professed, of both sexes, marriage was forbidden for the remainder of their lives; and in some instances was a bar to their assuming the monastick habit. This was thought a sacrifice likely to wean their desires from worldly objects, and enable them to dedicate more entirely, both their minds and bodies to the service of God. Their profession was in some respects a civil death. They made their testaments before they took their vows, as if about to depart life, and were ever afterwards prohibited from acquiring possessions by the severest penalties. Between the members of the convent, a perfect equality reigned as to property; none was richer or poorer than the rest. They ate, and drank, and slept, at stated times, in the same room, abstaining much from flesh and wine, and distributing the remainder of their repast to the poor. All excess of diet, garment, and furniture was prohibited, and habitual silence particularly recommended to their

the state; prior to the reformation, by a king and parliament of the roman catholick communion, in almost all points

their observance. This instance of self-denial seems to have been adopted by them with great reason; for loquacity usually breeds disputes which destroy the harmony of small societies, and to him who is accustomed to talk much even prudent silence becomes an irksome burden. The nuns had confessors appointed by the bishops, and all strangers were forbidden to enter the monasteries except on necessary occasions. In a word, every measure was adopted that could mortify the natural vanity and concupiscence of the human mind; to promote which ends the more effectually, both monks and nuns vowed subjection to the regulations of their respective orders, and an almost implicit obedience to the head of their community. Hence it is apparent that those Saxon monks, mentioned by Mr. Hume in the first volume of his history, who mixed with the world, had liberty to marry, and were not subject to the rigid rules of an order, were monks only in name, and not in reality.—As the hardships of a life, such as we have described, could not be supposed to suit every disposition, a certain time of probation was allowed to the novices, which differed in the different religious houses, being either one, two, or three years at most.

These characteristics point out the monks to have been an order of men very distinct from the clergy. It was their duty “to mourn, not to teach,” for teaching implies talking, and an intercourse with mankind, whereas their vow was to observe solitary silence. “If,” says St. Jerome in one of his epistles, “you wish to exercise the office of a presbyter, if the post or the burthen of a bishoprick please you, live in towns and cities, and let the care of others constitute the benefit of your own soul; but if you wish to be what you are called, a *monk*, that is, to lead a solitary life, what have you to do in cities, which are filled with crowds?” Their profession was not, however, incompatible with the clerical order, and, if they were found worthy of that honour, and obtained the consent of their abbot, they might be ordained by the bishop, and were frequently advanced to the highest offices in the church. Indeed their learning and eloquence made them serviceable to the bishops, who on that account were glad to draw them from their monasteries into the towns, and employ them in controversial divinity. But as they generally retained a partiality for their monastic order and vow, and in many points disputed the authority of the bishop, when it interfered with the regulations of their houses, and also procured the richest church livings to be appropriated to their own use, they at last excited the resentment both of the laity and clergy.

points except the king's supremacy : and the pope by his bulls and licences had shewed the way before.

One thing greatly to be lamented is, that in the hurry of the dissolution, better provision was not made for the performance of divine offices, in such churches as had been appropriated to the monasteries, which both the ministers and parishioners of those places suffer for to this day, and is justly accounted a scandal to our reformation.

Another thing to be lamented is, the loss of a great number of excellent books, to the unspeakable detriment of the learned world. For there was scarce any religious house but had a library, and several of them very good ones. From their chronicles, registers, and other books relating to their own houses and estates, the history and antiquities of the nation in general, and almost every particular part of it, might have been more fully discovered. The many good accounts of families ; of the foundation, establishment, and appropriation of several parish churches, and the endowment of their vicarages ; of the ancient bounds of forests, counties, hundreds, and parishes ; of the privileges, tenures, and rents, of many manors and estates, and the like, which we meet with in such of their books as have been preserved, is a sufficient proof that the advantage would have been still greater, if we had been so fortunate as to preserve more of them.

It is not presumed here to determine, whether they were more hurtful or beneficial to the kingdom. The choicest records and treasures of learning were preserved in these houses. They were schools of learning and education ; for every convent had one person or more appointed for this purpose ; and all the neighbours that desired it, might have their children taught grammar and church music there, without any expence to them. In the nunneries

It was from their institutions, however, that the regular clergy (who lived together in towns, and were thereby distinguished from the seculars, who were distributed amongst the country parishes) borrowed the monastic rules by which they governed their communities. [See, on this subject, Nov. 5. with the exposition of Cujac. tom. lii. De conf. Diss. 5. c. 33. Hieronim. tom. i. ep. 13. Ayliffe's *Parerg.* 368. Lindw. 306. Gibson's *Codex*, 1152.; *Appropriation*, I ; and the two first chapters of an ingenious publication of Mr. Highmore on mortmain.]

Monasteries.

also, young women were taught to work and to read: and not only the lower rank of people, but most of the noblemens and gentlemens daughters were taught in those places.—All the monasteries were in effect great hospitals; and were most of them obliged to relieve many poor people every day. They were likewise houses of entertainment for almost all travellers.—And the nobility and gentry provided not only for their old servants in these houses by corrodies, but for their younger children and impoverished friends, by making them first monks and nuns, and in time priors and prioresses, abbats and abbesses.

On the other hand they were very injurious to the secular and parochial clergy; by taking to themselves many prebends and benefices, by getting many churches appropriated to them, and pensions out of many others; and by the exemptions they got from the episcopal jurisdiction, and from the payment of tithes. And they were no less injurious to the nation in general, by depriving the publick of so many hands, which might have been very serviceable to it in trade and other employments; by greatly diminishing the number of people, in consequence of the institution of celibacy; and by their houses or churches being sanctuaries for almost all manner of offenders. And if the superstition had continued, and the zeal of establishing religious institutions had exerted itself with equal vigour to the present age; we should by this time have been a nation of monks and friars, or probably have become a prey to some foreign invader.

Moravians. See Dissenters.

Mortmain.

Mortmain,
what,

1. **MORTMAIN** is, where lands and tenements are given to any corporation, sole or aggregate, ecclesiastical or temporal; and is called *mortmain*, as coming into a *dead hand*; because the lords of the fee could receive nothing of the alinee any more than from a dead hand, but lost their escheats and services before due to them. 1 *Inst.* 2.

2. Before

2. Before the statutes of mortmain (y), bodies once incorporated might have been endowed, *perpetuis futuris temporibus*, without licence from the king or any other. *Refrains of mortmain.*
Gibf. 641.

But by *ch. 36. of the great charter, 9 H. 3.* commonly called the statute of mortmain; *it shall not be lawful to any to give his lands to any religious house, and to take the same land again to hold of the same house. Nor shall it be lawful to any house of religion to take the lands of any, and to lease the same to him of whom he received it. And if any from henceforth give his lands to any religious house, and thereupon be convicted, the gift shall be utterly void, and the land shall accrue to the lord of the fee.*

There were two causes of making this statute; one, that the services that were due out of such fees, and which in the beginning were created for the defence of the realm, were unduly withdrawn; the other cause was, that the chief lords did lose their escheats, wardships, reliefs, and the like. 2 *Inst.* 75.

But the ecclesiastical persons (who in this were to be commended, that they had ever the best learned men in the law that they could get, of their counsel) found many ways to creep out of this statute; to wit, religious men, as abbots, priors, and other ecclesiastical persons regular, to purchase lands holden of themselves, or take leases for long term of years, and many other devices they had to escape out of this statute; and bishops, parsons, and other ecclesiastical persons secular, took themselves to be out of this statute. 2 *Inst.* 75.

The statute of the 7 *Ed. 1. st. 2.* commonly called the statute *De religiosis*, intended to provide against these devices, which is as followeth: *Where of late it was provided, that religious men should not enter into the fees of any without licence and will of the chief lord; and notwithstanding, such religious men have entred as well into their own fees, as into the fees of other men, appropriating and buying them, and sometimes receiving them of the gift of others, whereby the services that are due of such fees, and which at the beginning were provided for the defence of the realm, are wrongfully withdrawn, and the chief lords do lose their escheats of the same; it is ordained that no person religious or other whatsoever he be, that will buy or sell any lands or tenements, or under the*

(y) The reader will find an ingenious deduction of these acts of parliament, and of the evasions which rendered them necessary, in Mr. Highmore's History of Mortmain.

colour of gift or lease, or that will receive by reason of any other title whatsoever it be lands or tenements, or by any other craft or engine will presume to appropriate to himself, under pain of forfeiture of the same, whereby such lands or tenements may any wise come into mortmain: and if any person, religious or other, do presume either by craft or engine to offend against this statute, it shall be lawful for the lord of the fee to enter, and upon his neglect the king shall enter.

[That will buy or sell any lands or tenements, &c.] The translation here, as in many other places in the printed books, seemeth to be imperfect. The sense is this: *It is ordained, that no person, religious or other, whatsoever he be, shall presume to buy or sell, or under colour of gift or lease or any other title whatsoever to take of any person, or by any other means by craft or engine to appropriate unto himself any lands or tenements, whereby such lands and tenements may in any wise come into mortmain; on pain of forfeiture of the same.* The words are, in the original, “Statuimus—quod nullus religiosus aut alius quicumque terras aut tenementa aliqua emere vel vendere aut sub colore donationis aut termini vel alterius tituli cujuscunque ab aliquo recipere aut alio quovis modo arte vel ingenio sibi appropriare presumat sub forisfactura eorumdem per quod ad manum mortuam terre et tenementa hujusmodi deveniant quoquo modo.”

[*Either by craft or engine*] A man would have thought that this should have prevented all new devices; but they found also an evasion out of this statute; for this statute extendeth but to gifts alienations and other conveyances made between them and others, by craft or engine; and therefore they gave over them, and they pretending a title to the land that they meant to get, brought a *præcipe quod reddat* against the tenant of the land, and he by consent and collusion should make default, and thereupon they should recover the land, and enter by judgment of law; and so the statute was defrauded. 2 *Inst.* 75.

When this new invention was also provided for, and taken away by the statute of the 13 *Ed.* 1. c. 32. yet they found out an evasion out of all these statutes; for now they would neither get any lands by purchase, gift, lease, or recovery, but they caused the lands to be conveyed by feoffment or in other manner to divers persons and their heirs, to the use of them and their successors, by reason whereof they took the profits. But this was enacted by the statute of the 15 *R.* 2. c. 5. to be mortmain, within the forfeiture of the said statute of the 7 *Ed.* 1. 2 *Inst.* 75.

But after all, the said statute of the 15 R. 2, did extend only to bodies *corporate*; therefore by the 23 H. 8. c. 10. it is enacted as followeth: *Where by reason of feoffments and other assurances made of trust, of lands and other hereditaments to the use of parish churches, chapels, guilds, fraternities, commonalties, companies or brotherhoods, erected and made of devotion or by common assent of the people without any corporation, or for obits or other like uses, there groweth and issueth to the king and other lords and subjects of the realm the like losses and other inconveniencies, and is as much prejudicial to them, as is in case where lands are aliened into mortmain; it is enacted, that all and every such uses shall be void; and all collateral assurances in defrauding of this statute shall be also void; and this statute shall be interpreted most beneficially to the destruction of such uses.*

M. 34 & 35 El. Martindale and Martin. In ejectment by the lessee of Sir Edward Clere against the lessee of Peacock, for certain lands in Thetford, upon a special verdict the case was, An ancestor of sir Edward Clere devised certain lands to divers and their heirs (under whom Peacock claimed) to the use of them and their heirs, upon this trust and confidence, that they out of the profits of it should erect a free school, and pay so much to the master yearly, and so much to the usher, and should give 10 l a year to five poor men; and the question was, whether these uses were void by the statute of the 23 H. 8. c. 10. And after argument, all the justices held, that this disposition was not restrained by the statute; for that was only to restrain superstitious uses, and never intended to restrain uses that were in favour of learning and relief of the poor. *Cro. El. 288.*

And lord *Coke* says, that any man, notwithstanding this statute, may give lands or other hereditaments to any person or persons and their heirs, for the finding of a preacher, maintenance of a school, relief and comfort of maimed soldiers, sustenance of poor people, reparation of churches, highways, bridges, causeways, discharging of the poor inhabitants of a town of common charges, for the making of a stock for poor labourers in husbandry, and poor apprentices, and for the marriage of poor virgins, or for any other charitable uses; and it is good policy upon every such feoffment or estate, to reserve to the feoffor and his heirs a small rent, or to express some such consideration of some small sum: so that the feoffees may be seised to their own use, and not to the use of the feoffor, by which it is out of

doubt that this statute cannot make void the use. 1 Co. 26. Gibf. 645.

alienation of
these restraints.

3. Though the prohibition by the statute of mortmain in the *magna charta* was absolute; yet with proper licence alienations might still be made, as appears from the preamble of the statute *De religiosis* before mentioned.

2 Inst. 74.

And by the 18 Ed. 3. ft. 3. c. 3. *If prelates, clerks beneficed, or religious people, which have purchased lands, and the same have put in mortmain, be impeached upon the same before our justices, and they shew our charter of licence, and process thereupon made by an inquest of ad quod damnum, or of our grace, or by fine; they shall be freely let in peace without being farther impeached for the same purchase.*

And by the 17 C. 2. c. 3. *Every owner of any impropriation, tithes, or portion of tithes in any parish or chapeltry, may give and annex the same or any part thereof, unto the parsonage or vicarage of the said parish church or chapel where the same do lie or arise, or settle the same in trust for the benefit of the said parsonage or vicarage, or of the curate and curates there successively where the parsonage is impropriate and no vicar endowed; without any licence of mortmain.* s. 7.

And if the settled maintenance of any parsonage, vicarages, churches, and chapels united, or of any other parsonage or vicarage with cure, shall not amount to the full sum of 100 l. a year clear and above all charges and reprises; it shall be lawful for the parson, vicar, and incumbent of the same, and his successors, to take and purchase to him and his successors, lands tenements rents tithes or other hereditaments, without any licence of mortmain. s. 8.

This licence was frequently given by the kings, notwithstanding the statutes to the contrary; partly by reason that the statutes gave to the king a right of entry in case of alienation in mortmain, if the lords did not enter within such a time; and this seemeth reasonable, because thereby the king only gives up that right of entry which those statutes do give him for the forfeiture, which every mesne lord might also do as well, so far as he had a right by those statutes: and partly, because the kings claimed a power inherent in the crown to dispense with statutes or acts of parliament. 2 Haw. 391.

But this dispensing power was carried so very high in the reign of king James the second, and found to be of such

such dangerous consequences as to make the execution of the most necessary laws in effect precarious, and merely dependent on the pleasure of the prince; and it seeming highly incongruous, that the king should have a kind of absolute unlimited power in dispensing with laws, wherein the church and state have the highest interest, when at the same time he hath no power at all to dispense with any law which vests the least right or interest in a private subject; it was found by experience necessary to declare and enact, by the 1 W. sess. 2. c. 2. *that no dispensation by non obstante to any statute shall be allowed; but that the same shall be held void and of none effect, except a dispensation be allowed in such statute.* 2 Haw. 391.

But with respect to alienations in mortmain, power was afterwards given to the king to grant licences as followeth, by the statute of the 7 & 8 W. c. 37. viz. *Whereas it would be a great hindrance to learning and other good and charitable works, if persons well inclined may not be permitted to found colleges or schools for encouragement of learning, or to augment the revenues of colleges or schools already founded, by granting lands tenements rents or other hereditaments to such colleges or schools, or to grant lands or other hereditaments to other bodies politick or incorporated, now in being, or hereafter to be incorporated for other good and publick uses; it is enacted, that it shall be lawful for the king, his heirs and successors, when and so often as they shall think fit, to grant to any person or persons, bodies politick or corporate, their heirs and successors, licence to aliene in mortmain, and also to purchase take and hold in mortmain, in perpetuity or otherwise, any lands tenements rents or hereditaments whatsoever, of whomsoever the same shall be holden; and the same shall not be subject to any forfeiture, by reason of such alienation or acquisition.*

And by the 2 & 3 An. c. 11. *It shall be lawful for any person by deed inrolled, to give to the corporation for augmenting the maintenance of the poorer clergy, any lands or goods for that use and purpose, without any licence or writ of ad quod damnum; the statute of mortmain, or any other statute or law notwithstanding.*

4. By the 9 G. 2. c. 36. *Whereas gifts or alienations of lands tenements or hereditaments in mortmain are prohibited or restrained by magna charta and divers other wholesome laws, as prejudicial to and against the common utility, nevertheless this publick mischief hath of late greatly increased, by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable* Further re-
straints by the
9 G. 2. c. 36.
uses,

uses, to take place after their deaths to the disposition of their lawful heirs; it is enacted, that from and after June 24, 1736, no manors lands tenements rents, advowsons or other hereditaments corporeal or incorporeal whatsoever, nor any stock or fund of money goods chattels stocks in the public funds securities for money or any other personal estate whatsoever to be laid out or disposed of in the purchase of any lands tenements or hereditaments, shall be given granted aliened sold or conveyed transferred assigned or appointed or any way conveyed or settled, to or upon any person or persons bodies politic or corporate or otherwise, for any estate or interest whatsoever, or any debt charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever: unless such gift conveyance appointment or settlement of any such lands tenements or hereditaments sum or sums of money or personal estate (other than stocks in the public funds) be made by deed indented sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor (including the days of the incision and death), and be enrolled in his Majesty's high court of chancery within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor (including the days of the transfer and death); and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof; and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him. §. 1.

Provided, that nothing herein before mentioned, relating to the sealing and delivery of any deed or deeds twelve calendar months at least before the death of the grantor or to the transfer of any stock six calendar months before the death of the grantor or person making such transfer, shall extend to any purchase of any estate or interest in lands tenements or hereditaments, or any transfer of any stock to be made really and bona fide for a full and valuable consideration actually paid at or before the making such conveyance or transfer, without fraud or collusion. §. 2.

And all gifts grants conveyances appointments assurances transfers and settlements whatsoever, of any lands tenements or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands tenements or hereditaments, or of any stock money goods chattels or other personal estate or securities for money, to be laid out

in the purchase of any lands tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall after the said 24th day of June 1736, be made in any other manner or form than by this act is directed, shall be void. s. 3.

Provided always, that this act shall not extend to make void the dispensations of any lands tenements or hereditaments, or of any personal estate to be laid out in the purchase of any lands tenements or hereditaments, which shall be made in any other manner or form than by this act is directed, to or in trust for either of the two universities; or any of the colleges or houses of learning within either of the said universities; or to or in trust for the colleges of Eton, Winchester, or Westminster, for the better support and maintenance of the scholars only upon the foundations of the said colleges of Eton, Winchester, and Westminster. s. 4.

Provided nevertheless, that no such college or house of learning, which doth or shall hold or enjoy so many advowsons of ecclesiastical benefices, as are or shall be equal in number to one moiety of the fellows or persons usually stiled or reputed as fellows; or where there are or shall be no fellows or persons usually stiled or reputed as fellows, to one moiety of the students upon the foundation, whereof any such college or house of learning doth or may, by the present constitution of such college or house of learning consist, — be capable of purchasing acquiring receiving taking holding or enjoying any other advowsons of ecclesiastical benefices by any means whatsoever: the advowsons of such ecclesiastical benefices are as annexed to, or given for the benefit or better support of the headships of any of the said colleges or houses of learning, not being computed in the number of advowsons hereby limited. s. 5.

In the case between *Ashburnham* and *Bradshaw* — Construction of
wills on the
statute.
Whereas by an order made on the hearing of this cause in the high court of chancery the 11th day of Dec. 1738, by the right honourable the lord high chancellor of Great Britain, his lordship, (among other things) declared the will of Robert Bradshaw in the said order named to be well proved, and that the first question in the cause appeared to be a point of law arising on the construction of a new act of parliament which had never come in judgment before, and to be a matter of great consequence; for which reason his lordship thought it fit in order to the settling the law thereupon, that the opinion of all the judges should be taken on the following case: viz. Robert Bradshaw, clerk, on the 29th day of November, in the

the year 1734, duly made and executed his last will and testament in writing; and by the said will gave and devised divers lands and tenements to trustees and their heirs, in trust or for the benefit of certain charitable uses therein mentioned, amongst several other trusts. The statute of the ninth year of his present majesty's reign, for restraining the disposition of lands in mortmain, commenced from and after the 24th day of June in the year 1736. In July 1736 the testator died, without revoking or altering the said will. *Quest.* Whether such gift or devise, so far as the same relates to the charitable uses aforesaid, be good in law notwithstanding the statute, or not? *Ans.* We have heard counsel on all sides, and are of opinion, that the gift or devise, so far as the same relates to the charitable uses aforesaid, is good in law notwithstanding the said statute (z).

Sergeant's Inn,	Wm. Lee.	J. Fortescue A.
Dec. 4, 1739.	J. Willes.	W. Fortescue.
	J. Comyns.	W. Chapple.
	F. Page.	T. Parker.
	Law. Carter.	M. Wright.
	E. Probyn.	(Judge Denton being absent.)

Devise of lands
to be turned into
money.

It hath been determined, that if a man deviseth his land to trustees to be turned into money, and that money laid out in a charity, it is not good within this act; for it is an interest arising out of land (a). So a devise of a mortgage,

(z) S. C. 2 Atk. 36. *Barn. Ca. Cha.* 7. In the *addenda* to *Higbmore on Mortmain*, p. 1. it is said, that the testator became insane from the time of making his will, and remained so till the time of his death. The same point was ruled in *Willett v. Sandford*, 1 *Vez.* 178 and 186. And of a devise of a trust of copyhold lands by a will made anterior to the statute, though the lands were not surrendered to the use of the will. *Att. Gen. v. Andrews*, 1 *Vezey*, 225. See *Barn. Ch. Rep.* 9.

(a) *Att. Gen. v. Lord Weymouth*, in the case of Sir John James's will, *Amb.* 20. *Mogg v. Hodges*, 2 *Vez.* 52. When land is devised, subject to the payment of a sum of money to a charity, it may become a question whether the money shall fall to the devisee, the residuary legatee, or the heir at law. See 8 *Med.* 222. In *Arnold v. Chapman*, 1 *Vezey*, 108, a testator having devised a copyhold estate to C., he causing to be paid 1000*l.* to his executors, who were to give the residue of his estate to the *Foundling Hospital*; *Ld. Hardwicke* decreed the

gage, or of a term for years, to a charity, is not good; for the words of the statute are, that the lands shall not be conveyed or settled, for any estate or interest whatsoever, or any ways charged or incumbered, in trust or for the benefit of any charitable use (b).

So also money given to be laid out in lands is expressly within the act (c) but money given generally is not; and

Of money to be laid out in lands.

if

1000 l. to be paid by the devisee to the heir at law; and the same point is said to have been ruled by Sir Thomas Sewel, M. R. in *Bland v. Wilkins*; see 1 Bro. 61. In these cases the money excepted must have been considered as part of the produce of land undisposed of. But in *Barrington v. Hereford*, where 1000 l. was left to be laid out in lands for B. charged with an annual sum to a charity, the Master of the Rolls gave it to the residuary legatee: but Ld. Apsley, C. decreed in favour of the specific devisee, the charge arising out of his estate. S. P. by Ld. Northington, C. in *Jackson v. Hurlock*, 1 Bro. 61.; contra by Ld. Cambden, C. in *Gravenor v. Hallam*, Amb. 643, in favour of the heir at law, from the apparent intention of the testator, and the reluctance of the court to disinherit the heir.

(b) *Att. Gen. v. Meyrick*, 2 Vex. 44.; *same v. Graves*, Amb. 155.; add Amb. 216, 635. So a devise of a lease for years, held under the crown, of the right of laying mooring chains in the river Thames, is within the act, *Negus v. Coulson*, Amb. 367.; and a legacy of money being attached to a devise of houses, the latter part of the bequest falling within the statute, the whole was decided to be void. *Att. Gen. v. Goulding*, 2 Bro. 428. But an annuity is not within the statutes, being to be provided out of the personal assets. *Higmore*, 99.

(c) So also money bequeathed to the corporation of Q. Anne's bounty; because, by the 16th rule of the corporation, it is to be placed out in the public funds, till laid out in proper purchases of lands; by Ld. Cambden. *Widmore v. Woodroffe*, Amb. 637. See *First Fruits and Tenths*, IV. 4. But it has been decided that a pecuniary legacy to be laid out in building a parsonage house was not within the statute. *Glub v. Att. Gen.* Amb. 373. *Brodie v. D. of Chandos*, 1 Bro. 444.; and a bequest of 200 l. to repair a free chapel was held good, it being only to support that which at the time of the will was in mortmain. *Harris v. Barnes*, Amb. 651. But ground cannot be purchased for the purpose of erection. *Att. Gen. v. Hyde*, Ec. Amb. 751. *Att. Gen. v. Nash*, 3 Bro. 588. And money being given to build a church where a chapel stood, but the bishop dissenting, Sir L. Kenyon M. R. refused to apply it to repairing or otherwise, saying that the intention must be implicitly followed, or nothing could be done. *Att. Gen. v. Bp. of Oxford*, 1 Bro. 444. See also

same

if money be given to be laid out in lands or otherwise to a charitable use, it hath been determined that such devise is good, by reason of the words [or otherwise]. As in the case of *Soresby and Hollis*, Aug. 6, 1740. John Naylor in 1738 made his will in these words; "I will and desire that my executors, within twelve months after my decease, do settle and secure, by purchase of lands, or inheritance, or otherwise, as they shall be advised, out of my personal estate, one annuity or yearly payment of 50*l.* to be paid yearly and distributed for ever, by my executors their heirs and assigns, among the poor and indigent people of Locke in the county of Stafford, in such manner as they shall think fit. And my will also is, that my executors do settle and secure one other annuity of 5*l.* to be paid yearly to the vicar of Locke for the time being for ever, for preaching an annual sermon on the 18th day of October." And the testator devised the residue of his personal estate, to be equally divided between his sisters Mrs. Soresby and Mrs. Hollis.

—By the lord chancellor Hardwicke: The only question in this case is, whether the devise of the two annuities of 50*l.* and 5*l.* to charitable uses, is void by the last statute of mortmain. It is insisted upon by the plaintiffs, the ordinary legatees, that it is void; because the direction of the devise is, to settle and secure the annuity of 50*l.* by trust of lands of inheritance: and though the words *or otherwise* are added, they will not vary the case; for Mr. Naylor's intention was, to give the annuity out of lands of inheritance. But I am of opinion upon this act of parliament, that this bequest was not void, and that there is no authority to construe it to be void, if by law it can possibly be made good. The act of parliament is not at all aimed against perpetual charities merely as such, or to prevent the establishment or creation of them, but is designed against the cases of perpetual charities in lands, and (as the title imports) to restrain the disposition of lands whereby the same become unalienable. The whole recital, and enacting part of the statute, take notice only of the unalienable disposal of land, whereby heirs are disinherited; and therefore the alienation or conveyance of lands to such purposes are prohibited. And although there is a clause to prohibit money being laid out in lands to such purposes as would make them unalien-

Jame v. Goulding, 2 Bro. 428. In *Oliphant v. Hendrie*, Ld. Thurlow, C. held, that money to be laid out in the purchase of heritable security in Scotland was not within the statute. 1 Bro. 571. able;

able ; yet there is no restriction whatsoever upon any one, from leaving a sum of money by will, or any other personal estate, to charitable uses, provided it be to be continued as a personalty ; and the executors or trustees are not obliged or under a necessity of laying it out in land by virtue of any direction of the testator for that purpose. Consider then, whether this clause and devise in the will fall within the restraint and prohibition of the statute. And in the first words they do fall within them. For the testator directs, that his executors shall *settle and assure by purchase of lands of inheritance*——And if the testator had rested upon such first words, the devise had been clearly void. But then he goes on in the disjunctive—*or otherwise as my executors shall be advised*. And if a devise in a will is in the disjunctive, and leaves to the executors two methods to do a particular thing by, the one lawfully, and the other prohibited by law ; can any court say, because one method is unlawful, that therefore the other is so, and the whole bequest void ? No ; for if one bequest is lawful, that shall be pursued, and take effect.——It hath been further argued against the devise, that the words [*for ever*] shew the annuities must arise out of some real estate, which only is capable of supplying them for ever : for personal funds are too perishable and transitory in their nature, to answer such everlasting annuities : and suppose a particular sum were vested in stock, with design to purchase a particular yearly sum or annuity ; it may so happen that the company may be quite dissolved, or that stock may fall, or interest be so reduced that half the annuity may not be produced. But these objections may be over-ruled. For if the company should be dissolved, the principal stock may be taken out, and vested in some other company. And there may be annuities that may probably continue for ever, and yet not payable out of land. I will mention an instance of one, which has lasted a century and a half, and may exist perpetually ; which is, Sir Thomas White's charity, being a disposition of money to be employed by continual rotation, in loans to poor tradesmen of several sums to be let for a settled number of years, and then to be repaid. And any man may, at this day, give by will a perpetual charity in this manner. But if a man by will secures such loans by lands or purchase of lands ; such devise shall be void, and contrary to the late statute of mortmain. If this case had been to be considered by the court, before the act ; it would, as the safest method to secure the charity for ever, have recommended and directed a purchase of lands : but when this court is precluded from doing it in this manner ;

manner; if it can be obtained in any other, there is no reason to say the devise is void.——It is said too, that the words [*heirs and assigns*] import a purchase in land or some real thing; for no personal thing can descend to heirs; and if the money is to be invested in a personal security, it will not go to the heirs, but to the executors; and so the intention of the testator will not be pursued. I will suppose, an obligor binds himself his heirs executors and administrators in a sum of money to a papist, who obtains judgment upon the bond and takes out an *Elegit*; in this case I think it has been held at the assizes, or at least it might very well have been so held, that the papist cannot maintain an ejectment, and yet the bond is good to bind the person of the obligor and his personal representatives, but not to charge his land or his heirs who represent him in his landed capacity. And this comes up to the present case; which may secure the charity in a double sense, either upon land or personalty, if the law would allow both; and if the law prohibits one only, it certainly allows the other. And I am of opinion upon the whole, that there is nothing that makes this bequest void in every part; but that it is good in that way which the law does not forbid. But I would not have it questioned, if a man should by his will direct a sum of money to be laid out in land or upon rent charge to be secured upon land for any charity, and in the mean time (till it can be laid out) to be vested in government securities for the benefit of the charity, but that that bequest will be void; because the final end and intention of such testator was to dispose of his money in land, and the investiture of it in government and personal securities was but to secure it till a proper purchase of land or rent charge offered.——As to the annuity of 5 l. there are fewer objections to that than to the other: for there is no direction at all for any money or personal estate to be laid out in land; for the executors are only willed to *secure and settle 5 l. a year* for the purpose there mentioned, and it must be secured upon a personal fund consistent with the will and intention of the testator, and not contradictory to the words of the act of parliament.——And as it is often said in old books by the judges that “I was by at the making of the act of parliament, and the meaning and intention of it was then said to be this or that;” so I was by at the making of this statute, and it was at that very time said by the legislature, that it would not hinder any charitable distribution of a personal estate. Therefore it was decreed, that the devise was good; and that the money

they should be invested in south sea stock, for the charitable purposes mentioned in the will (d).

Money for erecting an hospital or school, hath been determined not to be within the act. As in the case of *Vaughan and Farrer*, Feb. 26, 1751; John Allen by his will gave money to trustees, to erect, in some convenient place in or next the city of York, an hospital for the support and maintenance of as many poor old men, as the surplus of his effects would admit of, and to put in as many as they should think proper in their discretion. In support of the charity it was insisted, that for such erection it is not necessary that land should be purchased, for if any person will by deed give a piece of land to build the hospital upon, the trustees might build it there. So if one of the trustees will give it. Erecting doth not necessarily mean building, but founding; putting it on such a foot that the end may be answered; which was not for the sake of the building, but that out of the produce these poor might be maintained; and a house might be hired for that purpose, as is commonly done by the overseers of the poor. And for this was cited the case of *Gastrel and Baker*, 31 March, 1747: The testator's representatives brought a bill for the residue of the personal estate undisposed of by will, against the trustees, who were also executors, and who claimed it for a charity in the will, in these words: "I give all the rest and residue of my estate, of what nature soever, to trustees; in order to and towards erecting a school for the education of poor boys," in such a place, and in such manner, as the trustees should appoint. It was insisted to be a lapsed legacy by the mortmain act, and that erecting a school must mean buying and building. But his lordship held, that erecting included the founding, and consequently the maintenance of the master; which was a different thing from the mere school

(d) S. P. in *Grimmet v. Grimmet*, where the directions were that the money should be invested in parliamentary funds "until the whole could be laid out in land to the satisfaction of the trustees." *Amb.* 210. *Higmore on Mortmain*, 79. But where no such election or discretion was left to the trustees, Sir Thomas Clark, Master of the Rolls, decreed the devise void. *English v. Ord*, *Higmore on Mort.* 82. And a direction to place money at interest, until an eligible purchase of land could be made, was holden to be within the statute by Ashurst and Eyre, Lords Commissioners; *Grievus v. Case*, 4 Bro 67. where the court observed that the case of *Grimmet v. Grimmet* turned upon a very nice criticism of the expression.

place

place itself: but that the end might be obtained by hiring a house. And he directed accordingly.—By the lord chancellor Hardwicke: This case comes very near that case of the school. For a school imports, there should be some place in which the children shall be taught; for it cannot mean that it should be in the open air. So doth an hospital import some place, in which these people should be entertained. There is no direction in this will, that any part of this money should be laid out in building an hospital; for *erect* as well imports foundation as building; and therefore it was so construed in the case of the school; and so is the word *erigimus* construed in charters of the crown and private foundations. There is nothing in the statute prohibiting the giving personal estate to charity, provided it is not to be laid out in land; and the words of the statute are applied to improvident alienations to disinherit of heirs. If a personal estate is left to trustees for a charitable use, which they direct, and there is no occasion to come to a court of equity for direction, there is nothing in this statute restraining the trustees from laying out that in land; because by the express proviso, all purchases to take effect in possession are good, notwithstanding this act of parliament; which is a matter may perhaps want a remedy. If indeed these trustees were to come to this court for an establishment, the court would never direct it to be so laid out in land; but there is nothing illegal disabling the trustees from privately doing it, because the statute makes good all purchases to take effect immediately in possession. In the present case, if the trustees had come before the court, and laid a scheme that a certain person would give a piece of ground to build this upon: or if they had said, there were in *York* several charitable foundations belonging to the city, and they would let them build thereon for this hospital; the court would undoubtedly have accepted it. Nay they might have said, they would take a house in *York* for that purpose: there is nothing in the statute restraining the giving money to build. The act of parliament meant to leave persons to dispose of personal estate for a perpetual charity; but meant to prevent the great mischief of giving land for that, or money to be laid out in land; as that would lock up land from being used in a commercial way; which would be a detriment to the public. 2 *Vexy*, 182.

So in the case of the *Attorney General and Bowles*, July 24, 1754; William Bowles by his will gave 500 l. out of his personal estate to lay out part thereof in erecting a small school house, and a little house adjoining for the master to

live

live in, the whole purchase and building not to exceed 200 l. ; the remaining 300 l. to be laid out in the purchase of lands, or in some *real* security, for the maintenance of the master. It was urged, that *real* security meant substantial, good, and effectual security ; and therefore was not excluded by the statute. But Hardwicke lord chancellor held otherwise ; and that he must take the word *real* in the known, legal, signification of it, and could not annex a new idea to it ; therefore the 300 l. legacy was void within the statute. But as to the 200 l. if they could get a piece of ground by the gift or generosity of any person, not by purchase, they might be at liberty to apply to the court to lay out that 200 l. in erecting a school house thereon, but not to be laid out in land to build upon. 2 *Vezey*, 547. [See the opinions of Ld. Henley and Ld. Nottingham on this case, in *Att. Gen. v. Tyndall*, *Amb.* 616. (c)]

[Preaching is also a charitable use within the statute ; and a bequest of money to be laid out in land for the benefit of the preachers of a chapel, *provided they did not withdraw from and refuse officiating at the said chapel when able as usual*, was holden to be void, because the duty of preaching was imposed as a condition of the legacy. *Grievs v. Case*, before Lords Commissioners Eyre & Ashurst, 4 Bro. 67. 1 *Vezey* jun. 548. But where land was devised for life to a preaching minister, not *ea ratione quâ* preacher, but on condition that after the decease of the

Bequest for the support of a minister.

(c) So in a late case Wm. Davis made his will, dated 8th August 1788, and thereby bequeathed 2800 l. 3 *per cent.* reduced annuities, after certain limitations, *for and towards establishing a school in the parish of Betts in the county of Cornwall.* Against the charity it was insisted, that, under the statute of mortmain, whatever went directly or indirectly to the purchase of lands for a charity was void : that Ld. Hardwicke in the case before him might have decided otherwise, but that the succeeding chancellors (Ld. Nottingham, Lord Camden, and Ld. Thurlow) had learnt very much the other way ; and that here the dividends being to be applied towards *establishing* a school, that could not be executed without obtaining an interest in lands, and building a school house.—But the Ld. Chancellor (Ld. Loughborough) thought, that though under this disposition he could not have directed any part to be applied to the purchase of land or building, the master might teach in his own house or in the church ; and therefore ordered a scheme to be laid before the master, which should not include the application of any part of the dividends to the purchase or renting of land. *Att. Gen. v. Williams*, 4 Bro. 526.

testator he should convey the same to trustees, to take place at the decease of the minister, *for the use of the same preaching, &c.* and if that should be discontinued, for the use of a school; two judges of the king's bench held that the minister took the estate for life, notwithstanding the apparent intention to create a trust for the preaching, the words for that purpose being insufficient; but that the devise over after his death would be void. *Doe v. Aldridge*, 4 T. Rep. 264.

Marshalling
assets.

The court will not *marshal* assets to support a charity; that is to say, will not throw the testator's debts on his real estate, in order that his personal may suffice to pay a legacy to charitable uses. *Mogg v. Hodges*, 2 Vez. 52. *Att. Gen. v. Tyndall*, Amb. 614. *Makeham v. Hooper*, 4 Bro. 153. with the cases there cited. But in *Att. Gen. v. Caldwell*, Amb. 635. a testator having willed the residue of his personal estate, consisting of his effects, annuities, mortgages, bonds, and notes, to be sold, and the produce given to a charity; the devise of the mortgages was void; but the Master of the Rolls ordered an equitable arrangement of the personal assets, so that the mortgages might be first applied in payment of debts, and a large fund thereby left for the charity. But in a subsequent case Sir L. Kenyon, M. R. declared that he could not recognize a distinction between a specific gift of a mortgage which was void (*Att. Gen. v. Meyrick*, 2 Vez. 44.) and a gift of a residue in which it is comprized. In both cases it is an interest in land which cannot pass by the statute, but must go in favour of the parties legally entitled to the benefit of it. And he ordered the debts, legacies, and costs of the suit to be paid out of the testator's general personal estate, and out of the monies secured upon mortgage *pro rata*, and the residue of the mortgages to go to the next of kin. *Att. Gen. v. Earl of Winchelsea*, 3 Bro. 373.]

Mortuary.

1. **MORTUARY** seems to have been originally an oblation made at the time of a person's death. In the Saxon times there was a funeral duty to be paid, which was called *pecunia sepulchralis*, and *symbolum animæ*, or the *soul-shot*; which was required by the council of Ænham and enforced by the laws of king Canutus; and was due to the church which the party deceased belonged to, whether he was buried there or not. 1 Still. 171.

Dr.

Dr. Stillingsfleet makes a distinction between *mortuaries* and *corse presents*: the *mortuary*, he says, was a right settled on the church, upon the decease of a member of it; and a *corse present* was a voluntary oblation usually made at funerals. 1 *Still.* 172, 3.

And it seemeth, that in ancient times a man might not dispose of his goods by his last will and testament, without first assigning therein a sufficient mortuary to the church. And this, in a constitution of archbishop Winchelsea, is called the *principal legacy*; so denominated (saith Lindwood) because they who died did bequeath the best or the second best of their goods to God and the church, in the first place, and before other legacies. *Lind.* 196.

And in another constitution of the same archbishop it is enjoined, that if a person at the time of his death have three or more quick goods, the first best shall be given to him to whom it is due (that is, to the lord of the fee for a *heriot*); and the second best shall be reserved to the church where the deceased person received the sacraments while he lived. *Lind.* 184.

And this was usually carried to the church with the dead corps. And Mr. Selden quotes an ancient record, where it is recited, that a *corse* was present at the church the same day in the name of a mortuary, and that the parson received him, according to the custom of the land and of holy church. *Seld. Hist. Titb.* 287.

2. By the statute of the 21 H. 8. c. 6. *Forasmuch as* Limitation of
question and doubt hath arisen upon the order manner and form of demanding receiving and claiming of mortuaries, otherwise called corse presents, as well for the greatness and value of the same, which, as hath been lately taken, is thought other excessive to the poor people and other persons of this realm, as also for that such mortuaries or corse presents have been demanded and levied for such as at the time of their death have had no property in any goods or chattels, and many times for travelling and wayfaring men, in the places where they have happened to die; to the intent therefore that all doubt contention and uncertainty herein may be removed, and as well the generalty of the king's people therein remedied, as also the parsons vicars parish priests curates and others having interest in such mortuaries and corse presents indifferently provided for, it is enacted, that no parson, vicar, curate, nor parish priest, nor any other spiritual person, nor their farmers, bailiffs, nor lessees, shall take receive or demand of any person within this realm, for any person dying within the same, any manner of mortuary or corse present, nor any sum of money nor any other thing for the same, more
O o 2 than

than is hereafter mentioned; nor shall convent or call any person before any judge spiritual for the recovery of any such mortuaries or cause presents, or any other thing for the same, more than is hereafter mentioned: on pain to forfeit for every time so demanding receiving taking or convening or calling any such person before any spiritual judge, so much in value as they shall take above the sum limited by this act, and over that 40 s. to the party grieved contrary to this act, to be recovered by action of debt. s. 1; 2.

And no manner of mortuary shall be taken or demanded of any person whatsoever, which at the time of his death hath in moveable goods under the value of ten marks. s. 3.

And no mortuary shall be given or demanded of any person, but only in such place where heretofore mortuaries have been used to be paid and given; and in those places none otherwise but after the rate and form hereafter mentioned. Id.

And no person shall pay mortuaries in more places than one, that is to say, in the places of their most dwelling habitation, and there but one mortuary. Id.

And no person, vicar, curate, parish priest or other, shall for any person dying or dead, and being at the time of his death of the value in moveable goods of ten marks or more, clearly above his debts paid, and under the sum of 30 l. take for a mortuary above 3 s. 4 d. in the whole. And for a person dying or dead, being at the time of his death of the value of 30 l. or above, clearly above his debts paid, in moveable goods, and under the value of 40 l. there shall no more be taken or demanded for a mortuary, than 6 s. 8 d. in the whole. And for any person dying or dead, having at the time of his death of the value in moveable goods of 40 l. or above, to any sum whatsoever it be, clearly above his debts paid, there shall be no more taken paid or demanded for a mortuary, than 10 s. in the whole. Id.

Provided, that for no woman being covert baron, nor child, nor for any person not keeping house, any manner of mortuary, nor any thing or money by way of mortuary, shall be paid: nor also for any wayfaring man, or other, that dwelleth not nor maketh residence in the place where they shall happen to die; but that the mortuary of such wayfaring persons be answerable in places where mortuaries be accustomed to be paid in manner and form, and after the rate beforementioned, and none otherwise, in the place or places where such wayfaring persons at the time of their death had their most habitation, house and dwelling places, and no where else. s. 4.

Provided, that it shall be lawful to all parsons, vicars, curates, parish priests, and other spiritual persons, to take any sum of money or other thing, which by any person dying shall be

disposed given or bequeathed to them, or any of them, or to the high altar of the church. s. 5.

And no mortuaries nor corse presents, nor any sum of money or other thing for any mortuary or corse present, shall be demanded or taken in the parts of Wales, nor in the marches of the same, nor in the town of Berwick, but only in such places of the same where mortuaries have been accustomed to be paid: and in these places no mortuaries or corse presents, nor any other thing for mortuary or corse present, shall be demanded or taken, but only after the form and manner above specified; and none otherwise, nor of any other person than is limited by this act, upon the pain contained therein. s. 6.

Provided, that it shall be lawful to the bishops of Bangor, Landaff, St. David's and St. Asaph, and likewise to the archdeacon of Chester, to take such mortuaries of the priests within their dioceses and jurisdictions, as heretofore have been accustomed. s. 7.

Provided also, that in such places where mortuaries have been accustomed to be taken of less value than is aforesaid; no person shall be compelled to pay in such place any other mortuary or more for any mortuary, than hath been accustomed; nor that any mortuary in such place shall be demanded or taken of any person exempt by this act, nor in any wise contrary to this act, upon the pain afore limited. Id.

By the 12 Ann. st. 2. c. 6. The clause in the said statute, so far as it relates to the taking of any mortuary or corse present upon the death of any clergyman within the dioceses of Bangor, Landaff, St. David's, and St. Asaph, is repealed; and certain sine-cures and prebends are annexed to the respective sees, in recompence and in lieu of the mortuaries of priests dying within the said respective dioceses.

And as to the archdeaconry of Chester, it is said, that the custom there was, that the archdeacon (and after the erection of the episcopal see there the bishop as archdeacon) had for a mortuary, after the death of every priest dying within the archdeaconry of Chester, the best horse or mare, his saddle, bridle, spurs, his best gown or cloak, his best hat, his best upper garment under his gown, his tippet, and his best signet or ring. Cro. Car. 237.

But by the 28 G. 2. c. 6. The aforesaid clause, so far as it relates to the taking of any mortuary or corse present upon the death of any clergyman within the archdeaconry of Chester, shall immediately after the living of Warrington shall become void be repealed; and the said living shall be annexed to the see of Chester, in compensation of such mortuaries.

And

And by the 26 H. 8. c. 15. *Forasmuch as divers subjects inhabited within the archdeaconry of Richmond in the county of York, be and of long time have been sore and grievously exacted and impoverished, by the persons vicars and others such as have benefices and spiritual promotions within the same, or by taking of every person when he dieth, in the name of a pension or of a portion, sometime the ninth part of all his goods and chattels, and sometime the third part, to the open and manifest impoverishing of most part of the king's poor subjects inhabited and deceasing within the same: it is enacted, that no manner of spiritual person, or other, having any benefice or other spiritual promotion within the said archdeaconry, shall in any wise ask levy demand or take, after the decease of any person, any such portions or pensions, or any other demand or duty in the name or lieu of the same, on pain of a præmunire; but that all the king's subjects of the said archdeaconry, and their executors and administrators, shall be ordered and used for their goods and chattels after their decease, in like manner as is contained in the statute of the 21 H. 8. c. 5. for probate of testaments and none otherwise; any use, custom, bull, composition, prescription, or ordinance to the contrary notwithstanding.*

The rise of which custom was this: Of very ancient time, the inhabitants of the parish of St. Rumald's kirk, and after their example the inhabitants of the several other parishes within the archdeaconry of Richmond, being dissatisfied for that the executors or administrators of persons deceased gave nothing of the deceased's personal estate to the parish church, for the minister (according to the superstition of those times) to pray for the soul of the deceased; whereas, by the custom established within the province of York (and at that time throughout the whole kingdom) a certain portion of the deceased's personal estate ought to go and be disposed for the welfare of the soul of the deceased, which portion such person himself could not otherwise dispose of by will, nor his administrator after his death in case of intestacy; and this was, if the deceased did leave a wife and also a child or children, a third part of the clear personal estate; if he left a wife and no child, or a child or children and no wife, then a moiety; and if neither wife nor child, then the whole was the deadman's portion, to be disposed for the good of his soul: now the inhabitants aforesaid observing that the executors or administrators took and applied this whole deadman's portion to their own use, came to an agreement and resolution amongst themselves, to settle and establish for ever inviolably a determinate share and proportion of the said deadman's part, to be given to the incumbent

incumbent of their parish church to pray for the soul of the deceased. But in process of time their posterity, thinking this concession too burdensome, applied to the court of Rome for redress; setting forth, that the clergy, altho' they received, according to the custom of the kingdom of England, one of the best two quick goods of the deceased, demanded also one other of the best quick goods; and likewise the ninth part of all the moveable goods of the deceased, if he had a wife and children; if he had a wife and no child, or a child or children and no wife, then a sixth part; and if he had neither wife nor child, then a third part. The pope, having granted a commission to hear and determine the cause, did finally in the year 1254 order and decree, that for the future the clergy should receive only one of the two best quick goods; and if the deceased left a wife and children, his whole clear personal estate should be divided into three parts, of which the wife should have one, the children another, and the third part (being the deadman's part) should be divided into four, of which four parts the church should receive one; if the deceased left a wife and no child, or a child or children and no wife, then the whole should be divided into two parts, of which the wife or children respectively should have one, and the other part (being the deadman's share) should be divided into five, of which five parts the church should receive one; if he had neither wife nor child, then the whole (as pertaining intirely to the deceased) should be divided into six, of which six parts the church should have one. So that in the first case, where there was both wife and children, the church should have a twelfth part; in the second case, where there was a wife and no child, or a child or children and no wife, a tenth part; and in the third case, where there was neither wife nor child, the church should have a sixth part. *Registr. Hon. De Richm.* 101.

And after the statute aforesaid of the 21 H. 8. for limiting the sums to be paid for mortuaries, it seemeth that the clergy of the said archdeaconry would not have this to be a mortuary, but called it a pension or portion; for the abolishing of which claim and demand this statute was made.

3. By the statute of *Circumspecte agatis*, 13 Ed. 1. st. 4. *How*
If a person demand mortuaries, in places where a mortuary table,
both been used to be given; all such demands shall be made in the
spiritual court; and in all such cases the spiritual judge shall have
power to take knowledge, notwithstanding the king's prohibition.

Sir Simon Degge is of opinion, that an action also will now lie upon the aforesaid statute of the 21 H. 8. c. 6. But that statute plainly supposeth, that the recovery of the money shall

shall be solely in the spiritual court, as the recovery of the mortuary was before. *Wais. c. 53.*

In the case of *Johnson and Oldham, M. 12 W.* A prohibition was moved for, to be directed to the spiritual court, to stay a suit there for a mortuary, upon a suggestion of the statute, and that there was no custom in this case for the payment of it; and it was urged, that no mortuary was due but by custom; and therefore the custom here being denied, they ought not to proceed in the spiritual court. Against which, it was argued, that the statute of *Hen. 8.* hath saved the jurisdiction to the spiritual court, where mortuaries have been usually paid; besides, they ought first to plead in the spiritual court, that there is not any such custom; and then, upon refusal to admit the plea there, is the time to move the court of king's bench, and not before: but in this case they have not pleaded this matter in the spiritual court. And by Holt chief justice; a prohibition cannot be granted, without a denying of the custom in the spiritual court, which is not done here. (f). And the whole court seemed to be against the prohibition. And a rule was made to hear counsel on both sides. And afterwards the rule was discharged by the court. *L. Raym. 609.*

But if the custom be denied, and the spiritual court will not admit that plea, a prohibition will go; and they shall not try the custom there. *Cro. El. 151.*

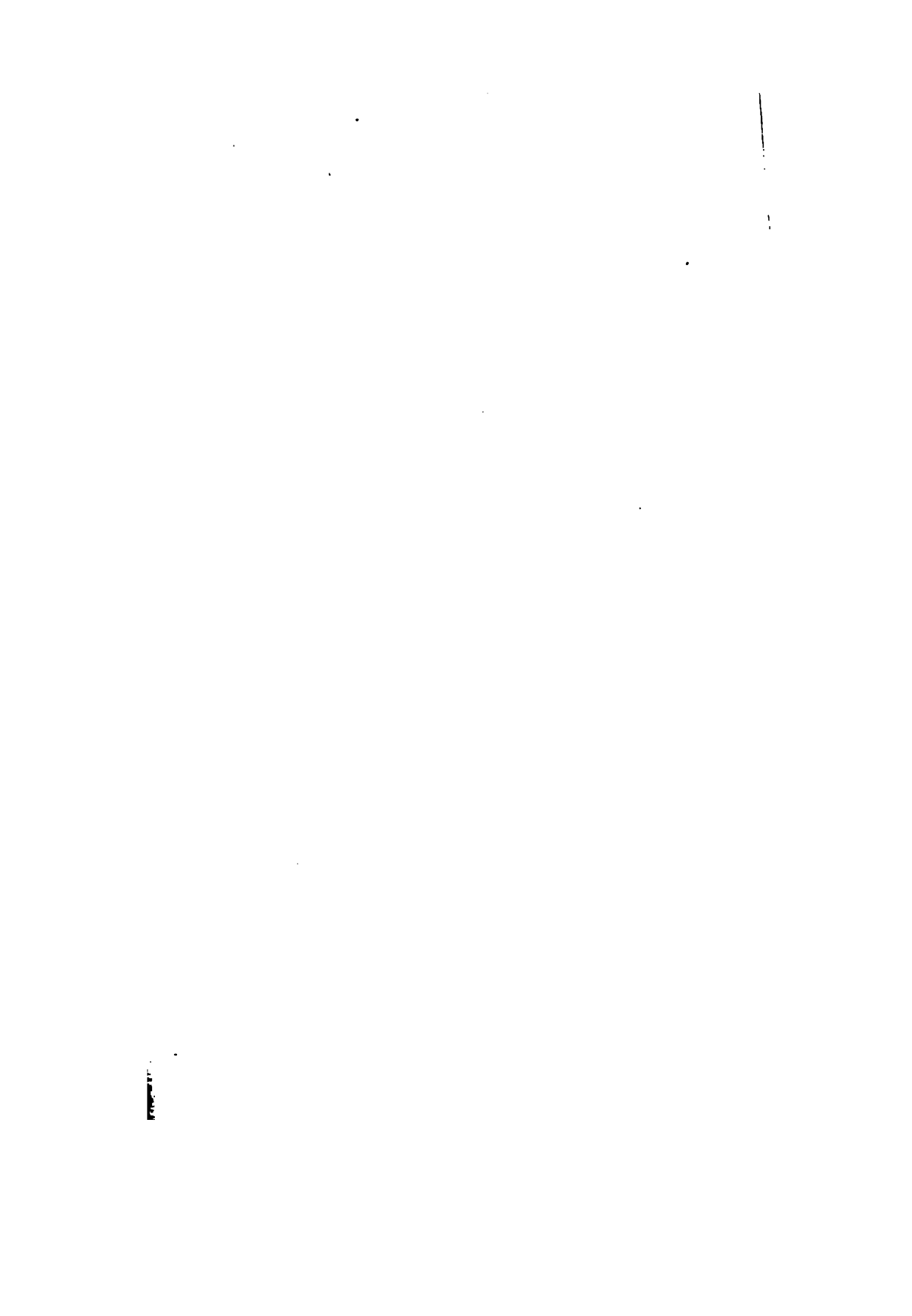
But where the custom of paying a mortuary was owned, and the only question in the spiritual court was, whether it belonged to the vicar or impropriator, a prohibition in such case hath been denied. *1 Keb. 919.*

In the case of *Torrent and Burley, M. 13 G.* In the exchequer: a bill was brought to discover, whether the defendant's husband died worth 40 l. so as to be liable to pay the plaintiff a mortuary; and pray relief. Upon answer, admitting assets, but denying the custom, the plaintiff went into a proof of his right; and several witnesses were examined on both sides. And at the hearing, the bill was dismissed with costs, as to the relief; because that was properly at law, or in the spiritual court; and in a bill against one person only, the right could not be established. *Str. 715.*

Fraudulent alienations to defraud mortuaries.

4. By the *13 El. c. 5.* All alienations of lands or goods, to defraud creditors and others of their just debts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, shall (as against such claimants) be utterly void and of none effect.

(f) *12 Mod. 416.*



Marshalling
assets.

testator he should convey the same to trustees, to take place at the decease of the minister, *for the use of the same preaching, &c.* and if that should be discontinued, for the use of a school; two judges of the king's bench held that the minister took the estate for life, notwithstanding the apparent intention to create a trust for the preaching, the words for that purpose being insufficient; but that the devise over after his death would be void. *Doe v. Aldridge*, 4 T. Rep. 264.

The court will not marshal assets to support a charity; that is to say, will not throw the testator's debts on his real estate, in order that his personal may suffice to pay a legacy to charitable uses. *Mogg v. Hodges*, 2 Ves. 52. *Att. Gen. v. Tyndall*, Amb. 614. *Makeham v. Hooper*, 4 Bro. 153. with the cases there cited. But in *Att. Gen. v. Caldwell*, Amb. 635. a testator having willed the residue of his personal estate, consisting of his effects, annuities, mortgages, bonds, and notes, to be sold, and the produce given to a charity; the devise of the mortgages was void; but the Master of the Rolls ordered an equitable arrangement of the personal assets, so that the mortgages might be first applied in payment of debts, and a large fund thereby left for the charity. But in a subsequent case Sir L. Kenyon, M. R. declared that he could not recognize a distinction between a specific gift of a mortgage which was void (*Att. Gen. v. Meyrick*, 2 Ves. 44.) and a gift of a residue in which it is comprized. In both cases it is an interest in land which cannot pass by the statute, but must go in favour of the parties legally entitled to the benefit of it. And he ordered the debts, legacies, and costs of the suit to be paid out of the testator's general personal estate, and out of the monies secured upon mortgage *pro rata*, and the residue of the mortgages to go to the next of kin. *Att. Gen. v. Earl of Winchelsea*, 3 Bro. 373.]

Mortuary.

1. **MORTUARY** seems to have been originally an oblation made at the time of a person's death. In the Saxon times there was a funeral duty to be paid, which was called *pecunia sepulchralis*, and *symbolum animæ*, or the *soul-shot*; which was required by the council of Ænham and enforced by the laws of king Canutus; and was due to the church which the party deceased belonged to, whether he was buried there or not. 1 Still. 171.

Dr.

Dr. Stillingfleet makes a distinction between *mortuaries* and *corse presents*: the *mortuary*, he says, was a right settled on the church, upon the decease of a member of it; and a *corse present* was a voluntary oblation usually made at funerals. 1 *Still.* 172, 3.

And it seemeth, that in ancient times a man might not dispose of his goods by his last will and testament, without first assigning therein a sufficient mortuary to the church. And this, in a constitution of archbishop Winchelsea, is called the *principal legacy*; so denominated (saith Lindwood) because they who died did bequeath the best or the second best of their goods to God and the church, in the first place, and before other legacies. *Lind.* 196.

And in another constitution of the same archbishop it is enjoined, that if a person at the time of his death have three or more quick goods, the first best shall be given to him to whom it is due (that is, to the lord of the fee for a *heriot*); and the second best shall be reserved to the church where the deceased person received the sacraments while he lived. *Lind.* 184.

And this was usually carried to the church with the dead corps. And Mr. Selden quotes an ancient record, where it is recited, that a *horse* was present at the church the same day in the name of a mortuary, and that the parson received him, according to the custom of the land and of holy church. *Seld. Hist. Titb.* 287.

2. By the statute of the 21 H. 8. c. 6. *Forasmuch as* Limitation of
question and doubt hath arisen upon the order manner and form mortuaries of
of demanding receiving and claiming of mortuaries, otherwise statute.
called corse presents, as well for the greatness and value of the
same, which, as hath been lately taken, is thought over excessi-
five to the poor people and other persons of this realm, as also for
that such mortuaries or corse presents have been demanded and
levied for such as at the time of their death have had no property
in any goods or chattels, and many times for travelling and way-
faring men, in the places where they have fortuned to die; to
the intent therefore that all doubt contention and uncertainty
herein may be removed, and as well the generalty of the king's
people therein remedied, as also the persons vicars parish priests
curates and others having interest in such mortuaries and corse
presents indifferently provided for, it is enacted, that no parson,
vicar, curate, nor parish-priest, nor any other spiritual per-
son, nor their farmers, bailiffs, nor lessees, shall take receive
or demand of any person within this realm, for any person dy-
ing within the same, any manner of mortuary or corse present,
nor any sum of money nor any other thing for the same, more
than

